Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-609

JOHN L. STEBBINS, JR.,
Petitioner,

v.

JOHN C. WEAVER and THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Petitioner, John L. Stebbins, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 7, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit of July 7, 1976 is reported at 537 F. 2d 939 and reprinted in Appendix C hereto (*infra*, pp. App. A-14-A-19).

The opinion of the United States District Court, Western District of Wisconsin, of June 3, 1975 is reported at 396 F. Supp. 104 and reprinted in Appendix D hereto (*infra*, pp. App. A-20-A-41). The further opinion of the United States District Court, Western District of Wisconsin, of July 3, 1975 is unreported but is printed in Appendix E hereto (*infra*, pp. App. A-42-A-45).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 7, 1976. A timely petition for rehearing, with suggestion of rehearing *en banc*, printed in Appendix B hereto (*infra*, pp. App. A-2-A-13), was denied on August 3, 1976 by order, printed in Appendix A hereto (*infra*, p. App. A-1), and this petition for certiorari was filed within 90 days thereafter. The petition is timely, *Department of Banking v. Pink*, 317 U.S. 264 at 266 (1942); *United States v. Healy*, 376 U.S. 75 at 78 (1964), and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether a professor in the University of Wisconsin higher educational system who performed, pursuant to two successive three-year contracts of employment, a six-year "tenure track" pre-tenure term of employment and who was entitled objectively by virtue of university regulations, memoranda, correspondence and consistent practice-in-fact, as well as by the common law of contracts of the State of Wisconsin, to tenure, if he satisfied certain performance criteria, which he alleges he did in fact fully satisfy, has a "property" interest in his employment sufficient to mandate the application of the due process clause of the Fourteenth Amendment to the United States

Constitution to the University of Wisconsin's denial of tenure to him?

Whether a professor in the University of Wisconsin higher educational system whose tenure denial was predicated in part upon a statement by the responsible university tenure decision-makers that his "research was not such as to warrant promotion" qualitatively, which statement was disclosed publicly and included in his university personnel file, and who alleges actual foreclosure from subsequent employment opportunity in his entire field of higher educational specialization and interest by reason of the statement, its public disclosure, and its inclusion in his university personnel file, has a "liberty" interest sufficient to mandate the application of the due process clause of the Fourteenth Amendment to the United States Constitution to the University of Wisconsin's denial of tenure to him?

Whether a professor in the University of Wisconsin higher educational system who is denied tenure and who, by assumption *arguendo* has a property interest in his employment or a liberty interest with respect to his tenure denial, within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution, may obtain federal judicial review of the University of Wisconsin's denial of tenure to him, which denial he alleges to be arbitrary and capricious because unsupported by any basis in fact whatsoever and contradicted by the entire record of his performance?

Whether the United States Court of Appeals for the Seventh Circuit exceeded its subject-matter jurisdiction by deciding the "property" and "liberty" questions set forth, *supra*, where those questions were not appealled by the respondents (by virtue of their disclaimer of appeal in their notice of cross-appeal, reiterated by them during appellate oral argument); or, in the alternative, whether the United States Court of Appeals for the Seventh Circuit exercised its subject-matter jurisdiction improp-

erly by deciding the "property" and "liberty" questions set forth, *supra*, without notice to appellate counsel, briefs, or oral argument, without consideration of record facts or the statutory, regulatory, or common law of the State of Wisconsin relevant to those questions, and without regard to the contrary opinion of the district court judge as to those questions and therefore in contravention of that judge's proper role, as set forth in *Bishop v. Wood*, — U.S. —, 96 S. Ct. 2074 at 2076-77 and nn. 9 and 10, 48 L. Ed. 2d 684 at 690-91 and nn. 9 and 10 (June 10, 1976), in assessing the relevant local law of the State of Wisconsin?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, of the Wisconsin statutes, and of the University of Wisconsin regulatory law are set forth in Appendix F hereto (*infra*, pp. App. A-46-A-50).

STATEMENT OF THE CASE

A. Facts Respecting the Denial of Tenure.

John L. Stebbins, Jr. was and is a citizen of the United States and of the State of Wisconsin and a resident of Milwaukee, Wisconsin.[1] In 1965 he was hired as an assistant professor

[1] All facts set forth herein are taken from the facts set forth in the opinions of the United States District Court, Western District of Wisconsin, 396 F. Supp. 104, reprinted in Appendix D hereto, *infra*, pp. App. A-20-A-41, and the United States Court of Appeals for the Seventh Circuit, 537 F. 2d 939, reprinted in Appendix C hereto, *infra*, pp. App. A-14-A-19, unless otherwise noted, in which event citations are to the original record pleadings, exhibits, and where occasionally appropriate, briefs.

of mathematics by the University of Wisconsin to be employed in the mathematics department of the Milwaukee campus of the university system. Pursuant to statute, regulation, guidelines, memoranda, and correspondence, his appointment was for a three-year term and was subject to renewal thereafter for a second three-year term. It was a probationary, "tenure track" appointment, the essence of which, under Wisconsin law, is that the appointee will be renewed for a second three-year term and tenured after six years of normal development in the areas of teaching, research, and community service.[2] Professor Stebbins was so informed in writing and orally. His appointment was renewed for a second three-year term, 1968-71. During the entire term of his "tenure track" employment, Professor Stebbins enjoyed an extremely successful teaching career, was productive in terms of both research publication and community service, was awarded merit salary increases, and was assigned expanded duties.

In January of 1970, however, the executive committee of the mathematics department met and voted to terminate Professor Stebbins' appointment. He was not notified of the meeting, was not afforded any opportunity to be heard, and was not permitted to consider and discuss whatever negative statements may have been made about him. More than that, the executive committee did not have before it any information respecting his record of accomplishment during the term of his six-year "tenure-track" appointment.[3]

[2] Section 36.06(1), (2), Wis. Stats. (1966), Regulations of the University of Wisconsin System, Section 10A.05, R. App. Doc. No. 32 Ex. No. 49, Appendix F hereto, *infra*, pp. App. A-46-A-50; R. App. Doc. No. 32, Ex. Nos. 50, 51, 53 at ¶ 7, and 21, Appendix B hereto, *infra*, pp. App. A-2-A-13.

[3] The trial court did not note fully in its opinion the absence of *any* information before the executive committee respecting Professor Stebbins' performance record. Moreover, the trial court drew certain inferences in its opinion respecting the probable flow of evaluative information about Professor Stebbins amongst and between the

Between January, 1970 and July 6, 1970 the dean of the college of letters and science disapproved the action of the executive committee of January 1970 and disapproved certain other attempted actions of the executive committee which occurred during that period.[4] On July 6, 1970 the executive committee met again and reaffirmed its January, 1970 decision. This time it stated two reasons for that decision: (1) Professor Stebbins' research was not such as to warrant promotion; and (2) his area of mathematical specialization, complex analysis, was adequately covered by tenured faculty within the department.[5] Once again Professor Stebbins was not afforded any opportunity to be heard and was not permitted to consider and

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members of the executive committee, which inferences were not at all supported by the complaint. R. App. Doc. No. 2, Complaint at ¶¶ 9(d) and 11. Professor Stebbins sought to correct the trial court's failure and impermissible inferences through the vehicle of his proposed amended and supplemental complaint. R. App. Doc. No. 25, Am. & Supp. Complaint at ¶¶ 10-21, 28, 31, 33, 34-39, 42, 44, 45-47. His motion to permit its filing was denied. Appendix E hereto, *infra*, pp. App. A-42-A-45.

The central thrust of Professor Stebbins' appeal focused *not* on the trial court's abstract lawmaking but rather on its erroneous findings and inferences of fact, application of law to those facts, and failure to permit their correction by denial of Professor Stebbins' motion to amend and supplement. See Brief of the Plaintiff-Appellant, Cross-Appellee at pp. 20-42, 48-53. The Circuit Court compounded that problem by simply affirming what the trial court did, without exploration of the pleadings or the record and without regard to detailed briefing and oral argument comparing and contrasting the trial court's "facts" with the pleadings. 537 F. 2d 939 at 941-42, Appendix C hereto, *infra*, pp. App. A-14-A-19. Strenuous reiteration of that comparison and contrast in the petition for rehearing and suggestion of rehearing *en banc*, Appendix B hereto, *infra*, pp. App. A-2-A.-13, fell on deaf ears. Appendix A hereto, *infra*, p. App. A-1.

[4] For a more detailed elaboration of the "other attempted actions of the executive committee", R. App. Doc. No. 32, Ex. Nos. 2a.-2d., 3a.-3d.; Brief of the Plaintiff-Appellant, Cross-Appellee at Brief Jt. App. pp. 6-7 & n. 1.

[5] R. App. Doc. No. 32, Ex. No. 2e.

discuss whatever negative statements may have been made about him.[6]

The committee's statement that "Professor Stebbins' research was not such as to warrant promtion . . . ", was publicly disclosed by it and was included by it in Professor Stebbins' personnel file.[7]

Four months after the July 6, 1970 meeting, the same committee voted to promote and to award tenure to another assistant professor within the department who had been untenured and whose area of mathematical specialization was complex analysis.

Also after the July 6, 1970 meeting the university committee on the Milwaukee campus of the University of Wisconsin and the office of legal counsel to the chancellor of the Milwaukee campus of the University of Wisconsin prodded the executive committee of the mathematics department to hold a hearing respecting its denial of tenure to Professor Stebbins.[8] However, because the conduct and decisions of the executive committee were repeatedly disapproved by the dean of the college of letters and science and because the executive committee was resistant to holding a hearing respecting its denial of tenure to Professor Stebbins, it became hostile to him.

In that posture, in March of 1971, the executive committee held hearings on the issue of reopening its earlier decision of July 6, 1970 regarding Professor Stebbins' tenure status. After four days of hearings, during which Professor Stebbins was given an opportunity to present information concerning his qualifications, the committee voted, by a seven-to-five margin,[9] to allow

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[6] *Supra*, note 3.

[7] R. App. Doc. No. 32, Ex. Nos. 2e., 3h., 3k., 3o.

[8] R. App. Doc. No. 32, Ex. Nos. 3j.-3s.

[9] R. App. Doc. N.o 2, Complaint at ¶ 20(d)(i).

its original decision to stand, thus denying him tenure status and effectively terminating his employment at the University of Wisconsin. Two of the committee members who participated in the vote on whether Professor Stebbins' case should be reopened did not attend the informational portions of the hearings. The committee refused Professor Stebbins' request that its decision be based solely on the evidence adduced at the hearing. The committee refused to disqualify from participation in the hearing or subsequent vote members who had participated in the earlier decision then under review. Professor Stebbins was not allowed to examine committee members as to the evidence upon which they had made their earlier decisions to deny him promotion and terminate his employment. The committee refused to state in writing the evidence upon which it based its determinations. No information whatsoever unfavorable to Professor Stebbins was presented at the hearing; information overwhelmingly favorable to him was presented at the hearing.

Professor Stebbins then appealed both alleged procedural errors by and the substantive decisions of the executive committee to the dean of the college of letters and science of the Milwaukee campus, to the university committee of the Milwaukee campus, then to the respondent Weaver, and finally to the respondent Board of Regents. Each reviewing agency or person allowed the decision of the executive committee to stand; each did so on the basis of lack of intra-university system jurisdiction or out of intra-university system comity-deference to other intra-university system decision makers; none actually reviewed either the alleged procedural errors by or the substantive decisions of the executive committee.[10]

During the pendency of the intra-university system appeals, Professor Stebbins was employed for a temporary, one-year

[10] *Ibid.* at ¶¶ 14-18.

period in the office of the dean of the college of letters and science of the Milwaukee campus.[11]

B. **Facts Respecting the History of the Trial Litigation.**

This federal civil rights action was commenced on April 27, 1972 by Professor Stebbins.[12] He alleged in his complaint that he had been denied tenure, and that his employment had been terminated by action of the respondent Board of Regents of the University of Wisconsin System and President of the University of Wisconsin System, and by their authorized delegees, all acting under color of state law.[13] He claimed property and liberty interests in access to tenure and continued employment.[14] He predicated his complaint jurisdictionally upon 28 U.S.C. §§ 1331 and 1343 and alleged an amount in controversy in excess of $10,000.00, exclusive of interest and costs.[15] He based his causes of action upon 42 U.S.C. § 1983 and the due process clause of the Fourteenth Amendment to the United States Constitution.[16] For relief, he sought declarations pursuant to 28 U.S.C. § 2201 respecting his right to procedural due process as to both the determination of tenure and the continuation of his employment; and his right to a non-arbitrary, non-capricious decision as to both the determination of tenure and the continuation of his employment.[17] He sought also mandatory injunctive relief requiring reinstatement, a specific type of fair hearing, and

[11] R. App. Doc. No. 32, Ex. Nos. 3rr.-3uu.

[12] R. App. Doc. No. 1, Summons; App. Doc. No. 2, Complaint.

[13] R. App. Doc. No. 2 Complaint at ¶¶ 1, 3, 6, 19 & 20.

[14] R. App. Doc. No. 2 Complaint at ¶¶ 1, 7, & 8.

[15] R. App. Doc. No. 2 Complaint at ¶¶ 2 & 4.

[16] R. App. Doc. No. 2 Complaint at ¶¶ 2 & 3.

[17] R. App. Doc. No. 2 Complaint Prayer at ¶¶ 1, 2, & 3.

a non-arbitrary, non-capricious decision as to both the determination of tenure and the continuation of his employment.[18] And, he sought a prohibitory injunction against the immediate future filling of any tenured positions by any other persons in the mathematics department until the latter declaratory and mandatory injunctive measures were accomplished.[19]

Professor Stebbins immediately moved for preliminary injunctive relief in the district court prohibiting the respondents from ". . . filling any tenured positions in the Mathematics Department of the University of Wisconsin-Milwaukee until after the final determination of this action . . ." and mandating that respondents ". . . continue to employ him in his present or equivalent position with the University of Wisconsin-Milwaukee until after the final determination of this action."[20]

On May 17, 1972 the respondents answered, denying his allegations of due process violations and setting up by way of affirmative defense allegations respecting their conclusion that "[a]ll due process and other rights of the petitioner, a non-tenured teacher whose contract was not renewed, were fully accorded to him."[21]

Between April 27, 1972 and July 3, 1972 Professor Stebbins filed two affidavits respecting certain facts,[22] and the parties filed an extensive stipulation of evidence which included a transcript of the executive committee administrative "hearing" of March, 1971 and sixty-nine (69) exhibits offered therein, minutes of the executive committee and fifty-six documents

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[18] R. App. Doc. No. 2 Complaint Prayer at ¶¶ 4 & 5.

[19] *Ibid.*

[20] R. App. Doc. Nos. 3 & 7.

[21] R. App. Doc. No. 4 Answer, Aff. Def. at ¶ 3.

[22] R. App. Doc. Nos. 8 & 9.

tracing the formal facts and proceedings respecting Professor Stebbins' loss of employment and denial of tenure.[23] Extensive briefs and replies were filed with the district court;[24] and, when this Court ruled on June 29, 1972 in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), supplemental briefs were filed.[25]

On October 4, 1972 Professor Stebbins' motion for preliminary injunction was denied in a brief opinion and order in which the district court held, as to his due process claim ". . . that there has been inadequate exploration of these procedural refinements to support interlocutory relief . . .," and, as to the requisites of "property" or "liberty" mandated by *Roth-Sindermann*, that Professor Stebbins ". . . has not demonstrated a sufficiently good chance that he would ultimately prevail in this action in this respect."[26]

On June 12, 1974 the respondents filed in the district court a notice of motion and motion to dismiss on the grounds that: (1) the Eleventh Amendment to the United States Constitution deprived the court of subject matter jurisdiction; (2) because the respondents were not "persons" within the meaning of 42 U.S.C. § 1983, the court lacked subject matter jurisdiction; and (3) Professor Stebbins failed to state a claim upon which relief could be granted, because he failed ". . . to al-

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[23] R. App. Doc. Nos. 31 & 32 and indexed, stipulated documents and exhibits included herein.

[24] Jt. App. to the Brief of the Plaintiff-Appellant, Cross-Appellee, Nos. 2-6. See letter of 9/26/75, Walter F. Kelly to Thomas F. Strubbe; Affidavit of Walter F. Kelly at Jt. App., No. 1. After the initial round of briefing, Jt. App. Nos. 2-4, the district court called for supplemental briefs in light of this Court's *Roth-Sindermann* opinions. Jt. App. Nos. 5 & 6.

[25] *Ibid.*

[26] R. App. Doc. No. 10.

lege facts showing that . . . [he] . . . possessed a job interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution and the only 'right, privilege or immunity' allegedly denied to him by employes and agents of the respondents is the here nonexistent right to . . . due process."[27] On the same day, the respondents filed with the court an eighteen-page brief in support of said motion.[28] The brief reviewed the facts, as perceived by the respondents, and argued extensively the following questions: Eleventh Amendment immunity; whether the respondents are "persons" within the meaning of 42 U.S.C. § 1983; and whether Professor Stebbins had a sufficient *Roth-Sindermann* "job interest" to invoke the due process clause of the Fourteenth Amendment.[29]

On July 11, 1974 Professor Stebbins filed his brief respecting the issues of law as to the Eleventh Amendment, the "persons" defense, and the *Roth-Sindermann* "property," "liberty" issues.[30]

Never did the respondents seek a ruling on their motion to dismiss beyond the briefed issues of (1) Eleventh Amendment immunity, (2) 42 U.S.C. § 1983 "persons"; and (3) *Roth-Sindermann* "property", "liberty" issues as to due process.[31] Nor did the trial court, although obviously preparing an extensive opinion respecting the operation of the tenure system generally and in this particular case,[32] ever call upon the parties to pre-

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[27] R. Ap. Doc. No. 27.

[28] R. Ap. Doc. No. 35, Item No. 1.

[29] *Ibid.*

[30] R. App. Doc. No. 35, Item No. 3.

[31] R. App. Doc. No. 35, Items Nos. 1 & 4; App. Doc. No. 17.

[32] R. App. Doc. Nos. 21, 35, Items Nos. 14, 15, 16, 17, 18, 19, 20, 21 & 22.

sent their views, either factually or legally, respecting the application of the due process clause to the tenure system either generally or in this particular case.[33]

On June 3, 1975 the trial court ruled. Its opinion granted *a* motion to dismiss—and *not* the respondents' motion to dismiss. Indeed, the trial court denied the respondents' motion to dismiss as to the Eleventh Amendment immunity question, the 42 U.S.C. § 1983 "persons" defense, and most importantly, the *Roth-Sindermann* "property", "liberty" defense, as to which the trial court held, 396 F. Supp. 104 at 111:

> "In the present case the plaintiff has alleged an explicit, though unwritten [sic], contractual agreement under which he was entitled to tenure provided certain conditions on his part were met, and he has alleged those conditions were met. Dismissal for lack of such a protected interest would be proper only after consideration of whatever evidence the plaintiff may be able to submit."

On June 12, 1975 Professor Stebbins moved to amend the trial court's June 3, 1975 judgment to permit the filing of a motion to amend and supplement his complaint to ". . . conform to the decision . . ."[34]

On June 13, 1975 the trial court stayed its June 3, 1975 judgment and permitted Professor Stebbins to file by June 25, 1975 a motion to amend and supplement with attached, proposed amended and supplemental complaint, with accompanying brief.[35]

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[33] Compare and contrast the relative briefing and opinions on the motions for preliminary injunction and to dismiss. R. App. Doc. Nos. 10, 21, & 35, Items Nos. 1, 3, & 4; Jt. App. Nos. 2-6.

[34] R. App. Doc. Nos. 23, 35, Item 22.

[35] R. App. Doc. No. 24.

On June 24, 1975 Professor Stebbins filed the preceding documents, together with an affidavit of his counsel respecting the showing of "cause" as to amendment and supplementation.[36]

On July 3, 1975 the trial court in an opinion and order denied the motion and vacated the stay order of June 13, 1975.[37]

Thereafter, Professor Stebbins filed Notice of Appeal and appropriate costs bond, thereby appealing the opinion, order, and judgment of June 3, 1975 and the opinion and order of July 3, 1975.[38]

On August 6, 1975 respondents cross-appealed on the Eleventh Amendment and 42 U.S.C. § 1983 "person" rulings by the trial court; they expressly did not appeal the trial court's ruling denying their motion to dismiss as to the *Roth-Sindermann* "property", "liberty" defense.[39]

C. **Facts Respecting the History of the Appellate Litigation.**

The parties to the appeal and cross-appeal presented five issues to the Court of Appeals for decision. Professor Stebbins presented the questions of (1) whether the trial court properly reached out to the merits of his due process claims; (2) whether the trial court properly determined the facts of and decided the merits of his tenure-denial due process claims; and (3) whether the trial court properly denied his motion to amend and supplement his complaint, which motion sought to meet the trial court's dismissal opinion. John C. Weaver and the Board of Regents of the University of Wisconsin System presented the

[36] R. Ap. Doc. Nos. 25, 35, Item No. 23.

[37] Appendix E hereto, *infra*, pp. App. A-42-A-45.

[38] R. App. Doc. Nos. 27, 28 & 29.

[39] R. App. Doc. No. 30.

questions of (4) whether they were "persons" within the meaning of 42 U.S.C. § 1983; and (5) whether as to each of them the Eleventh Amendment to the Constitution of the United States was a bar to the declaratory and injunctive relief sought by Professor Stebbins. The parties did not brief and did not argue the *Roth-Sindermann* "property", "liberty" issues. During oral arguments in the Circuit Court the bench inquired of both counsel respecting those issues and was informed by both counsel that those issues were not before the Circuit Court.[40]

In its opinion of July 7, 1976, the Circuit Court did *not* decide issues (2), (4), and (5). The Court *did* decide issues (1) and (3).[41] It also expressly decided that Professor Stebbins had neither a sufficient "property" interest nor sufficient "liberty" to invoke the due process protections of the Fourteenth Amendment. Respecting "property", it held broadly that Professor Stebbins' employment status was identical to that of Professor Roth, and it thereby established a *per se* rule denying due process protections to every non-tenured public employee in the states of Illinois, Indiana, and Wisconsin. The Circuit Court also mistakenly determined that there had been no public disclosure of the reasons for Professor Stebbins' tenure denial and therefore held that he had not been deprived of "liberty". And, it suggested by way of dicta that, even if Professor Stebbins had either a sufficient "property" interest or sufficient "liberty" to invoke the protections of the Fourteenth Amendment, it would not review his claim because federal courts should not review claims of arbitrariness and caprice in tenure-denials based on "subjective evaluation" of tenure candidates unless that degree of substantive arbitrariness and caprice which it characterized as "gross abuse" could be demonstrated by the tenure candidate.

[40] The oral argument was tape recorded, but it has not been transcribed.

[41] *Supra*, note 3.

Professor Stebbins timely petitioned for rehearing *en banc* due to the Circuit Court's excess of subject-matter jurisdiction by deciding unpresented issues, improper exercise of subject-matter jurisdiction, constitutional error in not deciding presented issues, error of law, mistakes as to record facts, and most importantly, overbreadth of rationale as to the "property" issue and overbreadth of dicta as to the "arbitrariness and caprice" issue with serious consequential harm to all nontenured public employees in the states of Illinois, Indiana, and Wisconsin.[42] The petition was denied on August 3, 1976 summarily and without explanation.[43]

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[42] Appendix B hereto, *infra*, pp. App. A-2-A-13.

[43] Appendix A hereto, *infra*, p. App. A-1.

REASONS FOR GRANTING THE WRIT

I. With Respect to the Question of "Property", the Writ of Certiorari Should Be Granted Because the United States Court of Appeals Exceeded Its Subject Matter Jurisdiction, Usurped the Proper Role of the District Court Judge in Determining the Relevant Local Law of the State of Wisconsin, Incorrectly Determined the Relevant Local Law of the State of Wisconsin, and Established an Overly Broad *Per Se* Rule Inconsistent With Prior Decisions of This Court and Destructive of the Due Process Rights of Non-Tenured Public Employees in the States of Illinois, Indiana and Wisconsin.

A. This Court has been scrupulous in assuring that federal trial and appellate courts do not exceed their subject-matter jurisdiction. See, e.g., *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Liberty Mutual Insurance Co. v. Wetzel*, —U.S.—, 96 S. Ct. 1202, 45 L. Ed.— (March 23, 1976). Fed. R. App. P. 3(c) compels the appealing party to designate the whole or part of the judgment or order from which it appeals, and compliance with Rule 3 is a precondition to appellate jurisdiction. *United States v. Robinson*, 361 U.S. 200 at 224 (1960). While this Court has been quite liberal in giving interpretation to the intent of appealing party, see, e.g., *Foman v. Davis*, 371 U.S. 178 (1962), see generally, 9 *Moore's Fed. Prac.* ¶ 203.18 at pp. 752-57 (Matthew Bender Co. 1975), with respect to the issues sought to be appealed, it has never read Rule 3(c) to permit an expressly unappealed issue to be decided. And the entire weight of the case law in the courts of appeals, including this circuit, is against such an excess of appellate jurisdiction, see, e.g., *Bach v. Coughlin*, 508 F. 2d 303 (7th Cir. 1974), *Ruchman & Hansen, Inc. v. Contracting & Material Co.*, 328 F. 2d 744 (7th Cir. 1964), *Moore v. Fowinkle*, 512 F. 2d 629 (6th Cir. 1975), *Terkildsen v. Waters*, 481 F. 2d 201 (2nd Cir.

1973), *United States v. Ramos*, 413 F. 2d 743 (1st Cir. 1969), where, as here, the intent of the appealing party is clearly not to present the issue.

B. *Bishop v. Wood*, —U.S.—, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (June 10, 1976), expressly directs that federal judicial decisions determining whether a particular employment interest constitutes "property", depending as they do upon assessments of local law, should be decided in the first instance by federal trial judges, who are best situated to determine the law of the locality in which they sit. In the instant case ". . . the opinion of the United States District Judge who sits in [Wisconsin] and practiced law there for many years", and who, we add, is thoroughly familiar with the law of this locality respecting the University of Wisconsin higher educational employment system, e.g., *Johnson v. Board of Regents of the University of Wisconsin System*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd summ.*, 510 F. 2d 975 (7th Cir. 1975), held that the "property" interest asserted by Professor Stebbins should be tried. The appellate court usurped the trial court's role in deciding that issue over against the trial court's contrary assessment, and, as we shall see, did so erroneously.

C. All the imaginable dangers of deciding an unpresented issue, without the benefit of briefs and arguments, and over against the decision of the trial judge to the contrary, were realized in the Court of Appeals' opinion of July 7, 1976, for the Court incorrectly equated Professor Roth's employment status, *Board of Regents v. Roth*, 408 U.S. 564 (1972), at the Oshkosh campus of the *state college* system with Professor Stebbins' employment status at the Milwaukee campus of the *University of Wisconsin* system; failed to realize that Professor Stebbins did indeed allege a *de facto* tenure similar to that considered in *Perry v. Sindermann*, 408 U.S. 593 at 601 (1972) and recently reiterated in *Bishop v. Wood* — U.S. —, 96 S. Ct. 2074, 48 L. Ed. 2d 684 and nn. 6 and 7 (June 10,

1976), and failed to examine either the applicable tenure statutes and regulations or the common-law of contracts of the State of Wisconsin, all of which utterly contradict the Circuit Court's conclusion that "[a]s with Roth, it is settled that plaintiff 'did not have a *property* interest sufficient to require' the Fourteenth Amendment's procedural protections."

Professor Roth was a member of the political science department of the Oshkosh faculty of the "old"[44] *state college* system. His appointment was governed by the statutes and regulations applicable to that system. They are set forth in *Board of Regents v. Roth*, 408 U.S. 564 at 566-68 and nn. 1-4, 578-79 and n. 16 (1972). Roth had essentially a one-year temporary appointment which this Court characterized as providing ". . . no real protection for a nontenured teacher who simply is not reemployed for the next year," . . . "thus clearly leav[ing] the decision to rehire a nontenured teacher for another year to the unfettered discretion of university officials." 408 U.S. 564 at 567 (1972).

Professor Stebbins, on the other hand, was a member of the mathematics department of the Milwaukee campus faculty of the "old"[45] *University of Wisconsin* system. His appointment, two successive, three-year contracts, and employment status were governed by the statutes and regulations applicable to *that* system. The statute was § 36.06(1), (2), Wis. Stats. Ann.

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[44] The term "old" is used, because the two systems—state college and University of Wisconsin—were merged at times subsequent to the happening of the primary facts in this action. See Title VI, Ch. 36, Wis. Stats. Ann. (1973), respecting L. 1971, c. 100, initially consolidated the two "old" systems, and respecting L. 1973, c. 335, §§ 5 and 6, repealing "old" chapters 36 and 37 and creating "new" chapter 36, thereby legislatively effectuating the merger. The relevant legislation and history is located in the pocket part of Vol. No. 5, Wis. Stats. Ann., and is reprinted in pertinent part in Appendix F hereto, *infra*, pp. App. A-46-A-50.

[45] *Ibid.*

(1966). It is a broad authorizing statute, pursuant to which regulations and letters and terms of appointment were issued, all of which are in this record. See R. App. Doc. No. 32, Ex. Nos. 49 § 10A.05, Appendix F, *infra*, pp. App. A-46-A-50, defining a "tenure track" probationary appointment; 50, the initial, unconditional appointment of Professor Stebbins; 51, the second, unconditional reappointment of Professor Stebbins; 53, ¶ 7, describing the "tenure track" commitments made to Professor Stebbins; and 21, the "tenure track" guideline criteria of the Milwaukee campus division of natural science of which the mathematics department was a part. These statutes, regulations, guidelines, and other documents show unequivocally, as briefed to the trial court judge on the preliminary injunction, see Jt. App. No. 6 at pp. 1-5, and on the subsequent motion to dismiss, R. App. Doc. No. 35, Item No. 3 at pp. 6-7, that, *unlike Professor Roth*, Professor Stebbins, a "tenure track" professor, had a clear objective expectation of continued employment; and it was these materials and these briefs, which were before him at the time, that led the trial court judge, in light of his knowledge of the system, to conclude correctly that the respondents' motion to dismiss had to be denied as to the "property" issue Moreover, Professor Stebbins did allege a *de facto* tenure similar to that considered in *Perry v. Sindermann*, 408 U.S. 593 at 601 (1972). R. App. Doc. No. 2, Complaint at ¶¶ 7 and 8; Jt. App. No. 6 at pp. 1-5; R. App. Doc. No. 35, Item 3 at pp. 6-7; and R. App. Doc No. 24, Am & Supp. Comp. at ¶¶ 3, 22-28.

The common law of contracts of the State of Wisconsin, taken together with the statutes, regulations, guidelines, and other documents set forth *supra*, create a "property" right in Professor Stebbins' objective expectation of continued employment. See, e.g., *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 66 Wis. 2d 469 at 487-89 (1975), *aff'd.* on this issue, — U.S. —, 96 S. Ct. 2308, 49 L. Ed. 2d 1 n. 2 (June 17, 1976) by this Court, citing *Roth*

and *Sindermann; Johnson v. Board of Regents of the University of Wisconsin System*, 377 F. Supp. 227 at 234-35 (W.D. Wis. 1974), *aff'd. summ.*, 510 F. 2d 975 (7th Cir. 1975). Compare *Goss v. Lopez*, 419 U.S. 565 at 573-74, 576-77 (1975).

D. The Circuit Court's decision respecting "property", written as broadly as it is, and giving the reading that it does to this Court's opinions in *Roth*, *Sindermann*, and *Bishop*, has the effect of denying the protection of the due process clause of the Fourteenth Amendment to the United States Constitution to every non-tenured professor in the University of Wisconsin system and very likely to every non-tenured public employee in the states of Illinois, Indiana, and Wisconsin.

II. With Respect to the Question of "Liberty", the Writ of Certiorari Should Be Granted Because the United States Court of Appeals Exceeded Its Subject Matter Jurisdiction and Ruled Inconsistently With Prior Decisions of This Court and Because This Court Has Granted Certiorari in Similar Cases Presently Pending Before This Court as to Which the Courts of Appeals Are Divided.

A. As to this ground, see Point I A, *supra*, p. A-1.

B. The Circuit Court erroneously determined that Professor Stebbins is ". . . free to seek another job . . .," and that there was ". . . no public disclosure of the reasons for the denial of tenure." However, as set forth in the statement of facts, *supra*, there was, indeed, public disclosure, and the reasons were placed in Professor Stebbins' personnel record, and Professor Stebbins did allege actual foreclosure from subsequent employment by virtue of the disclosure and personnel record inclusion. Hence, the Circuit Court's opinion as to Professor Stebbins' "liberty" is inconsistent with this Court's recent decisions in *Board of Regents v. Roth*, 408 U.S. 564 at 575 (1972); *Paul*

v. Davis, —U.S. —, 96 S. Ct. 1155 at 1161-66, 47 L. Ed. 2d 405 at 414-20 (March 23, 1975), and *Bishop v. Wood*, — U.S. —, 96 S. Ct. 2074 at 2077, 48 L. Ed. 2d 684 at 691-92 and n. 12 (June 10, 1976). Compare *Goss v. Lopez*, 419 U.S. 565 at 574-75 (1975), and *Hampton v. Mow Sun Wong*, — U.S. —, 96 S. Ct. — at — and n. 23, 48 L. Ed. 2d 495 at 508 and n. 23 (June 1, 1976).

C. In *Cowley v. Velger*, — F. 2d — (2nd Cir. 1975), this Court has granted the writ of certiorari to review a similar question, 44 Law Week 3748, 45 Law Week 3023 (1976), as to which the courts of appeals are in conflict. Compare, e.g., *Russell v. Hodges*, 470 F. 2d 212 (2nd Cir. 1972); *Buhr v. Buffalo Pub. School Dist. No. 38*, 509 F. 2d 1196 (8th Cir. 1974); *Huntley v. Comm. School Board of Brooklyn*, — F. 2d —, 44 LW 2574 (2nd Cir. May 12, 1976); *Weathers v. West Yuma County School District R-J-1*, 530 F. 2d 1335 at 1338-39 (10th Cir. 1976). See generally *Comment: The Due Process Rights of Public Employees*, 50 N.Y.U. L. Rev. 310 at 329-35 (1975); Johnson, *Probationary Government Employees and The Dilemma of Arbitrary Dismissals*, 44 Cincinnati L. Rev. 698 at 711-13 (1975).

III. With Respect to the Question of Administrative "Arbitrariness and Caprice", the Writ of Certiorari Should Be Granted Because the United States Court of Appeals Unduly Narrowed the Scope of Federal Judicial Review Inconsistently With Prior Decisions of This Court and Destructively to the Due Process Rights of Non-Tenured Public Employees in the States of Illinois, Indiana, and Wisconsin, and Because This Case Presents a Vehicle for Clarifying a Question of Public Importance as to Which the Law Is Unsettled.

A. As to the Circuit Court's footnote alternative holding respecting the scope of judicial review of allegedly arbitrary and capricious tenure denials, the Court is wrong as a matter of

law in abstracting into creation a new and more rigorous standard of "gross abuse", and wrong as a matter of application of law to fact in implying that, because the denial of tenure to Professor Stebbins involved "subjective" evaluation, there was no "gross abuse" in this case.

A long line of this Court's decisions has established that the state administrative action which deprives a citizen of "property" or "liberty" irrationally constitutes a deprivation of due process of law. See, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Cafeteria Workers Union v. McElroy*, 367 U.S. 886 (1961); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952). The Circuit Court in this case, citing *Chung v. Park*, 514 F.2d 382 at 387 (3rd Cir. 1975), suggested an incursion upon this elemental principle of fairness by stating ". . . in cases such as this one, where the decision is based on a subjective evaluation, we would decline to review the merits absent some showing of gross abuse." In addition to its suggestive limitation of "administrative arbitrariness" review, that holding conflicts with the more recently articulated view of at least one member of this Court, see *Arnett v. Kennedy*, 416 U.S. 134 at 180, 183-85 (1974). Moreover, *Chung v. Park*, *supra*, is to the contrary for there the court did review the decision to terminate Dr. Chung's employment and found it to be supported by the evidence. In the instant case, Professor Stebbins alleges, and the trial and appellate courts assumed as fact, that all evidence was favorable to him and that there was no evidence unfavorable to him.

B. The direction set by the Circuit Court's opinion will be clear to all state employers: simply articulate a "subjective evaluative" basis for termination and federal judicial scrutiny is eliminated, absent "gross abuse." Indeed, this Court's *dicta*

in *Bishop v. Wood*, — U.S. —, 96 S. Ct. 2074, 48 L. Ed. 2d 684 at 692-93 and n. 14 (June 10, 1976), when lifted out of its explanatory context, is susceptible of the same interpretation. Hence, the instant case, coupled with *Bishop's dicta* seriously endangers the right to be treated fairly of public employees in the states of Illinois, Indiana, and Wisconsin.

C. The question of the application of the due process clause to administratively arbitrary public employment terminations is one to which this Court has not turned, although this Court has considered and resolved the same question in the area of private employment governed by federal labor law. See, e.g., *Vaca v. Sipes*, 386 U.S. 771 (1967); *Hines v. Anchor Motor Freight, Inc.*, — U.S. —, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (March 3, 1976). The question has festered at trial and appellate levels in the federal judicial system, e.g., *Buhr, supra, Weathers, supra, Jeffries v. Turkey Run Consolidated School District*, 492 F. 2d 1 at 4 (7th Cir. 1974), *Scheelhaase v. Woodbury Cent. Community School District*, 488 F. 2d 237 (8th Cir. 1973), *Anonymous v. Kissinger*, 499 F. 2d 1097 at 1102 (D.C. Cir. 1974), and is troubling the commentators as well. E.g., Johnson, *Probationary Government Employees and The Dilemma of Arbitrary Dismissals, supra*, at pp. 714-24 (1975), *Comment: The Due Process Rights of Public Employees*, 50 N.Y.U. L. Rev. 310 (1975), *Comment: Substantive Due Process: The Extent of Public Employees' Protection from Arbitrary Dismissal*, 122 U. Pa. L. Rev. 1647 (1974). Compare Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. Pa. L. Rev. 942 (1976) with Tribe, *Structural Due Process*, 10 Harv. C. R. & C.L. L. Rev. 269 at 275-89, 302, 308-10, 312 n. 128, 319 (1975).

CONCLUSION

With Respect to All Questions Presented, the Writ of Certiorari Should Be Granted to Resolve the Unsettled Questions of the Proper Role of the Trial and Appellate Courts of the Federal Judiciary in Scrutinizing Pursuant to the Due Process Clause of the Fourteenth Amendment the Minimum Rationality and Procedural Fairness of State Higher Educational Decisionmaking at the Critical "Breaking-Point" of Tenure *Vel Non*, Which Decisionmaking Impacts Upon a Special Class of Public Employees Peculiarly Susceptible to Caprice and Procedural Irregularity and Relates Directly and Substantially to the Robustness of That Class' Exercise of Academic Freedom.

Tenure is the key to job security within the higher educational system of this Nation. Generally speaking, neither collective bargaining agreements, to the extent they exist within higher educational employment systems, nor civil service statutes and regulations, to the extent that they govern, nor "campus common law", to the extent it either occupies the field or fills gaps in contract, statutory, or regulatory law, afford substantial qualitative protection to those professors who are not yet tenured yet who have made substantial commitments of their lives, in time and energy, to higher educational employment. Because most public university systems, and especially the larger, state-financed, integrated systems, such as the University of Wisconsin system, place the responsibility and the power respecting tenure decisions in the majoritarian institution of departmental committees, nontenured professors are peculiarly subject to majority authority. Structurally the danger is great that they will do "what they have to do", with particular respect to their secure seniors and university administrators, to "get tenure". Such a structure inherently contains serious obstacles to the full freedom of thought, inquiry, exploration, and expression embodied in the concept of academic freedom. In this re-

spect, not yet tenured professors are not unlike collective bargaining unit minorities who must cope with employer-bargaining representative controlled grievance mechanisms to decide their grievances. Compare *Vaca v. Sipes, supra, Hines v. Anchor Motor Freight, supra.* Yet, the public law is in disarray as to whether such professors may claim the protection of the due process clause of the Fourteenth Amendment, and if so, as to whether they may claim such protections to the extent of assuring the minimum rationality of tenure *vel non* decision-making, and the minimum requisites of a procedurally fair personnel system. The petitioner requests this Court to grant the writ of certiorari in this case in order to resolve that disarray on this full and complete record.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel
WALTER F. KELLY
GOLDBERG, PREVIANT & UELMEN s.c.

October, 1976

APPENDIX

APPENDIX A

United States Court of Appeals
For the Seventh Circuit

August 3, 1976

John L. Stebbins, Jr., Plaintiff-Appellant, Cross-Appellee, Nos. 75-1845, 1846 vs. John C. Weaver, et al., Defendants-Appellees, Cross-Appellants.	Appeal and Cross-Appeal from the United States District Court, Western District of Wisconsin. Civ No. 72-C-111. James E. Doyle, Judge.

Order

On consideration of the petition of the appellant, John L. Stebbins, Jr., for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

APPENDIX B

In the United States Court of Appeals
For the Seventh Circuit

John L. Stebbins, Jr., Plaintiff-Appellant, Cross-Appellee, vs.	Appeal and Cross-Appeal from the United States District Court, Western District of Wisconsin.
John C. Weaver and Board of Regents of the University of Wisconsin System, Defendants-Appellees, Cross-Appellants.	Civil Action No. 72-C-111. (Honorable James E. Doyle) App. Nos. 75-1845, 75-1846.

Petition of the Plaintiff-Appellant, Cross-Appellee for Rehearing of This Court's Opinion and Judgment of July 7, 1976 and Suggestion of Rehearing En Banc

To: Honorable Walter J. Cummings, Circuit Court Judge, United States Court of Appeals for the Seventh Circuit

Honorable Robert A. Sprecher, Circuit Court Judge, United States Court of Appeals for the Seventh Circuit

Honorable William E. Steckler, Chief Judge, United States District Court, Southern District of Indiana, Sitting by Designation United States Court of Appeals for the Seventh Circuit

As the Panel that Decided this Case

And to All the Judges of the United States Court of Appeals for the Seventh Circuit

Now Comes the Petitioner, John L. Stebbins, Jr., the Plaintiff-Appellant, Cross-Appellee in this action, by his attorneys, Walter F. Kelly and Goldberg, Previant & Uelmen s.c., 6th Floor Midland Bank Bldg., 211 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, and hereby petitions the panel that decided this case on July 7, 1976 to rehear the case, and hereby further suggests to all the judges of the United States Court of Appeals for the Seventh Circuit that this case be reheard en banc. The basis for this Petition and Suggestion is set forth in full in this Petition and Suggestion.

Dated at Milwaukee, Wisconsin, this 19th day of July, 1976.

Introduction

The parties to the appeal and cross-appeal in this action, John L. Stebbins, Jr., the plaintiff-appellant, cross-appellee, and John C. Weaver and the Board of Regents of the University of Wisconsin System, the defendants-appellees, cross-appellants, presented five issues to this Court for decision.

John L. Stebbins, Jr. presented to the Court the questions of (1) whether the trial court properly reached out to the merits of his procedural and substantive due process claims; (2) whether the trial court properly decided the merits of his tenure-denial procedural and substantive due process claims; and (3) whether the trial court properly denied his motion to amend and supplement his complaint, which motion sought to meet the trial court's dismissal opinion. John C. Weaver and the Board of Regents of the University of Wisconsin System presented to the Court the questions of (4) whether they were "persons" within the meaning of 42 U.S.C. § 1983; and (5) whether as to each of them the Eleventh Amendment to the Constitution of the United States was a bar to the declaratory and injunctive relief sought by John L. Stebbins, Jr.

In its opinion of July 7, 1976, this Court did *not* decide issues (2), (4), and (5). This Court *did* decide issues (1) and (3). It also expressly decided that John L. Stebbins, Jr. had neither a sufficient "property" interest nor a sufficient "liberty" interest to invoke the procedural and substantive due process protections of the Fourteenth Amendment. And, it suggested by way of dicta that, even if John L. Stebbins, Jr. had a sufficient "property" interest or a sufficient "liberty" interest to invoke the substantive protections of the Fourteenth Amendment, federal courts should not review claims of substantive arbitrariness and caprice, in tenure denial based on "subjective evaluation" of the tenure candidate unless that degree of substantive arbitrariness and caprice which it characterized as "gross abuse" could be demonstrated by the candidate-plaintiff.

Reasons for Petitioning for Rehearing and Suggesting Rehearing En Banc

(A) As to the "property" and "liberty" decisions of this Court, the issues were *expressly* not presented by John C. Weaver and the Board of Regents of the University of Wisconsin System on their cross-appeal, App. Doc. No. 30, Original Brief of the Plaintiff-Appellant, Cross-Appellee at pp. 15-16 and n. 49, Original Brief for Defendants-Appellees, Cross-Appellants at pp. 3, 8, 45, Reply-Response Brief of the Plaintiff-Appellant, Cross-Appellee at p. 9, Reply Brief of Defendants-Appellees, Cross-Appellants on Cross-Appeal at pp. 1, 4,[1] and the trial court had ruled favorably to John L. Stebbins, Jr. on those issues, 396 F. Supp. 104 at 111 (W.D. Wis. 1975); and, so, this Court lacked subject-matter appellate jurisdictional power to decide them. Fed. R. App. P. 3(c). See *Bach v.*

[1] It is counsel's recollection that the Court was also expressly informed on oral argument that the "property", "liberty" issues were not before it.

Coughlin, 508 F. 2d 303 (7th Cir. 1974); *Ruckman & Hansen, Inc. v. Contracting & Material Co.*, 329 F. 2d 744 (7th Cir. 1964). See also *Moore v. Fowinkle*, 512 F. 2d 629 (6th Cir. 1975); *Terkildsen v. Waters*, 481 F. 2d 201 (2nd Cir. 1973); *United States v. Ramos*, 413 F. 2d 743 (1st Cir. 1969).[2]

(B) As to the "property" and "liberty" decisions of this Court, the issues, while briefed and argued below by the parties, see Joint Appendix, Nos. 2-6, App. Doc. No. 35, Item 1, App. Doc. No. 35, Item 3 at pp. 5-10, App. Doc. No. 35, Items 10, 15-22, were neither briefed nor argued in this Court, obviously because those issues were not presented to this Court. The patent irony, in this respect, for John L. Stebbins, Jr. is that an identical practice was visited upon him by the trial judge as to the merits of his procedural and substantive due process claim, which practice he asked this Court to condemn; and now this very Court turns around and engages in the very same practice with respect to the "property" and "liberty" issues. Just as we argued in our Original Brief that this practice, without more, by the trial court was a basis for reversal, see Original Brief at pp. 16-20, so now we argue that this practice by this Court, without more, is a basis for rehearing.

(C) As to the "property" and "liberty" decisions of this Court, the very case cited by this Court in support of its holdings on "property" and "liberty", *Bishop v. Wood*, — U.S. —, 44 L.W. 4820 (June 10, 1976), expressly directs that such

[2] Nor are the "property", "liberty" issues subject-matter jurisdictional in the trial court and therefore raisable at any time by the parties or *sua sponte* by the Court. See generally Bator, Mishkin, Shapiro & Wechsler, *Hart & Wechsler's* THE FEDERAL COURTS AND THE FEDERAL SYSTEM at pp. 835-840 (Foundation Press 1973). Those issues go to cause of action under the Fourteenth Amendment and 42 U.S.C. § 1983. E.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S.593 (1972); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Goss v. Lopez*, 419 U.S. 565 (1975); *Paul v. Davis*, — U.S. —, 44 L.W. 4337 (March 23, 1976); *Bishop v. Wood*, — U.S. —, 44 L.W. 4820 (June 10, 1976).

decisions, depending as they do upon assessments of local law, should be decided by the federal trial judge, who is best situated to determine the law of the locality in which he sits. See *Bishop v. Wood*, — U.S. —, 44 L.W. 4820 at 4821-22 and nn. 9 and 10 (June 10, 1976).

> "We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years."

In our case "the opinion of the United States District Judge who sits in [Wisconsin] and practiced law there for many years", and who, we add, is familiar with the law of the locality respecting the University of Wisconsin System, because so many of the cases on his docket, e.g., *Johnson v. Board of Regents of the University of Wisconsin System*, 377 F. Supp. 227 (W.D. Wis. 1974) arise out of that System, held that the "property" interest asserted by John L. Stebbins, Jr. should be tried. 396 F. Supp. 104 at 111.

(D) All the imaginable dangers of deciding an unpresented issue, without the benefit of briefs and arguments, and over against the decision of the trial judge to the contrary, were realized in this Court's opinion of July 7, 1976, for, the Court incorrectly equated David Roth's legal status, see *Board of Regents v. Roth*, 408 U.S. 564 (1972), at the Oshkosh campus of "old" state college system with John L. Stebbins, Jr.'s legal status at the UW-M campus of the "old" University of Wisconsin system; failed to realize that John L. Stebbins, Jr. did indeed allege a *de facto* tenure identical to that permitted in *Perry v. Sindermann*, 408 U.S. 593 at 601 (1972), and recently reaffirmed in *Bishop v. Wood*, — U.S. —, 44 L.W. 4820 at 4821-22 and nn. 6 and 7 (June 10, 1976), and failed to examine either the applicable tenure statutes and regulations or the common-law of contracts of the State of Wisconsin, all of which utterly contradict this Court's conclusion that "[a]s with Roth, it is settled that plaintiff 'did not have a *property*

interest sufficient to require' tthe Fourteenth Amendment's procedural protections." (Slip Opinion at p. 4.) And, on the "liberty" issue, this Court failed to consider that there was, indeed, disclosure of the reasons for plaintiff's denial of tenure, and that plaintiff did indeed allege actual foreclosure from subsequent employment, both of which facts give him a protected "liberty" interest under *Roth*, 408 U.S. 564 at 575 (1972); *Paul v. Davis*, — U.S. —, 44 L.W. 4337 at 4342, 4343 (March 23, 1976), and *Bishop v. Wood*, — U.S. —, 44 L.W. 4820 at 4822 and n. 12 (June 10, 1976).

(i) David Roth was a member of the political science department of the Oshkosh faculty of the "old"[3] state college system. His appointment was governed by the statutes and regulations applicable to that system. They are set forth in *Board of Regents v. Roth*, 408 U.S.564 at 566-68 and nn. 1-4, 578-79 and n. 16 (1972). Roth had essentially a one-year probationary appointment which the Supreme Court characterized as providing ". . . no real protection for a non-tenured teacher who simply is not re-employed for the next year," . . . "thus clearly leav[ing] the decision to rehire a nontenured teacher for another year to the unfettered discretion of university officials." 408 U.S. 564 at 567 (1972).

John L. Stebbins, Jr., on the other hand, was a member of the Mathematics department of the UW-M

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[3] The term "old" is used, because the two systems—state college and University of Wisconsin—were merged at times subsequent to the happening of the primary facts in this action. See Title VI, Ch 36, Wis. Stats. Ann. (1973), respecting L. 1971, c. 100, initially consolidating the two "old" systems, and respecting L. 1973, c. 335, §§ 5 and 6, repealing "old" chapters 36 and 37 and creating "new" chapter 36, thereby legislatively effectuating the merger. The relevant legislation is located in the pocket part of Vol. No. 5, Wis. Stats. Ann., as was cited to this Court by John L. Stebbins, Jr. at p. 7 o. his Reply-Response Brief.

faculty of the "old"[4] University of Wisconsin system. His appointment, two successive, three-year contracts, and employment status were governed by the statutes and regulations applicable to *that* system. The statute was § 36.06(1), (2), Wis. Stats. Ann. (1966). It is a broad authorizing statute, pursuant to which regulations and letters and terms of appointment were issued, all of which are in this record. See App. Doc. No. 32, Ex. Nos. 49 § 10A.05, defining a "tenure track" probationary appointment; 50, the initial, unconditional appointment of John L. Stebbins, Jr.; 51, the second, unconditional reappointment of John L. Stebbins, Jr.; 53, ¶ 7, describing the tenure track commitments made to John L. Stebbins, Jr.; and 21, the tenure track guideline criteria of the UW-M Division of Natural Science of which the Mathematics Department was a part. These statutes, regulations, guidelines, and other documents show unequivocally, as briefed to the trial court judge on the preliminary injunction, see Joint Appendix No. 6 at pp. 1-5, and on the subsequent motion to dismiss, App. Doc. No. 35, Item No. 3 at pp. 6-7, that, *unlike David Roth*, John L. Stebbins, Jr., a tenure track professor, had a clear objective expectation of continued employment; and it was these materials and these briefs, which were before him at the time, that led Judge Doyle to conclude correctly that the motion to dismiss of John C. Weaver and the Board of Regents of the University of Wisconsin System had to be denied as to the "property" issue.

(ii) John L. Stebbins, Jr. did, indeed, allege a *de facto* tenure identical to that permitted in *Perry v. Sindermann*, 408 U.S. 593 at 601 (1972). App. Doc. No. 2, ¶¶ 7 and 8; Joint Appdx. No. 6 at pp. 1-5; App.

[4] Ibid.

Doc. No. 35, Item 3 at pp. 6-7; and App. Doc. No. 24, ¶¶ 3, 22-28

(iii) The common law of contracts of the State of Wisconsin, taken together with the statutes, regulations, guidelines, and other documents set forth in D(i), *supra*, create a "property" right in John L. Stebbins, Jr.'s objective expectation of continued employment. See *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 66 Wis. 2d 469 at 487-89 (1975), aff'd. on this issue, — U.S. —, 44 L.W. 4864 at 4866 n. 2 (June 17, 1976), by the U.S. Supreme Court, citing *Roth* and *Sindermann; Johnson v. Board of Regents of the University of Wisconsin System*, 377 F. Supp. 227 at 234-35 (W.D. Wis.1974).

(iv) In July, 1970 the reasons for John L. Stebbins, Jr.'s denial of tenure were publicly disclosed. App. Doc. No. 32, Stipulation 2. e., Minutes, Exec. Comm., 7/6/70; and John L. Stebbins, Jr. did allege actual foreclosure from subsequent employment. Joint Appendix No. 6 at pp. 6-8; App. Doc. No. 35, Item No. 3 at pp. 7-10. See, e.g., *Huntley v. Comm. School Board of Brooklyn*, — F. 2d —, 44 L.W. 2574 (2nd Cir. May 12, 1976).

(E) As to this Court's dicta respecting the scope of judicial review of allegedly arbitrary and capricious tenure denials, the Court is mistaken as to certain facts in this case, wrong as a matter of law in abstracting into creation a new and more rigorous standard of "gross abuse", and wrong as a matter of application of law to fact in implying that there was no "gross abuse" in this case.

(i) We set forth the facts respecting the arbitrary and capricious action in our Original Brief in complete

detail at pp. 22-30 and nn. 56-76, pp. 39-40 and nn. 108-116. The court completely ignored those facts, repeated the factual errors of the trial court, and thereby patently abused the rule of liberal construction and fair inferences required by Fed. R. Civ. P. 12.

(ii) All arbitrary and capricious administrative action which deprives a citizen of "liberty" or "property" constitutes a Fourteenth Amendment substantive violation, regardless of whether it meets some judge's idea of "gross abuse". *Arnett v. Kennedy*, 416 U.S. 134 at 180, 183-85 (1974) (Opinion, White J.). See Original Brief at p. 47. *Chung v. Park*, 514 F. 2d 382 at 387 (3rd Cir. 1975), cited by the Court in justification of its "gross abuse" standard; is not to the contrary, but rather absolutely sustains John L. Stebbins, Jr.'s position, because it holds for the same standard we assert. 514 F. 2d 382 at 385, 387 and nn. 8-10 (3rd Cir. 1975).

(iii) In applying the general standard of *Chung v. Park*, *supra* to this case, the Court fails to recognize that in Dr. Chung's case substantial evidence *sustained* the accusation of incompetence, 514 F. 2d 382 at 385, 387 (3rd Cir. 1975), whereas in this case, it is *undisputed* that all the evidence sustained, and not one shred of evidence countervailed, John L. Stebbins, Jr.'s case. This case takes as true that the two "reasons" of the Executive Committee of July 6, 1970 were in fact incorrect. Hence, this is a case of complete irrationality. Cf., *Kelley v. Johnson*, — U.S. —, 44 L.W. 4469 at 4472 (April 5, 1976). See generally Brest, "Constitutional Rights to Fair and Rational Treatment", PROCESSES OF CONSTITUTIONAL DECISIONMAKING at p. 806 (Little, Brown & Co. 1975). A refusal to review

such a decision on the ground that it may involve "subjectivity" is the creation of a rule of judicial abdication that flies in the face of the language, history, and purpose of the Fourteenth Amendment and 42 U.S.C. § 1983. See Original Brief at p. 47.

(F) As to the Court's decision on issue (1), the Court is factually wrong, and therefore legally wrong as well. The Court says the merits were raised by the motion to dismiss. They were not! Original Brief at pp. 7-11 and nn. 21-30; 13 and n. 39; 16-20 and nn. 50-55. The Court says the merits were adequately briefed. There was no such briefing whatsoever! Original Brief at pp. 7-11 and nn. 21-30; 13 and n. 39; 16-20 and nn. 50-55; 49-50 and nn: 128-135. The Court says the trial judge gave John L. Stebbins, Jr.'s complaint the benefit of liberal construction and fair inferences. The trial judge did not! Original Brief at pp. 22-41 and nn. 56-122. The Court says the trial judge considered the entire record before ruling, and the Court cites for that proposition the trial judge's standard-form closing recitation ". . . upon the basis of the whole record . . ." However, again, as we pointed out in our Original Brief, the trial judge did not consider the entire record, for that record, even more so than the pleadings, contravenes the trial judge's "findings" of fact. Original Brief at pp. 6 and nn. 19 and 20: 29-30 and nn. 74-76; 41 and nn. 117-122. The Court says the trial judge invited further factual information. He did not! Original Brief at pp. 13-14 and nn. 40-41; 19 and nn. 54-55; 30 and n. 76; 41 and n. 121; 49-51 and nn. 128-135. The Court says no further factual information came forth from John L. Stebbins, Jr. It did! App. Doc. No. 24; Original Brief at pp. 30 and n. 76; 41 and n. 121; 49-51 and nn. 128-135. Then, the Court concludes by telling us that "[i]n such a setting, there was no abuse of Rule 12." The trouble is there was no "such a setting"; there was, rather, a setting which, as this paragraph AND THE RECORD show, is in every respect the opposite of this Court's description. Once the *real* setting

is admitted, the conclusion of the Court falls: there was glaring abuse of Rule 12. Original Brief at pp. 16-20 and nn. 50-55.

(G) As to the Court's decision on issue (3), the Court is again factually wrong, and therefore legally wrong as well. The Court says the amended and supplemental compaint "alleged no new facts which would have required the court to reconsider its earlier decision." But a simple comparison of App. Doc. No. 2, the original complaint, and App. Doc. No. 24, the amended and supplemental complaint, shows the specific allegation of approximately one hundred new facts, all of which were alleged to meet directly the trial court's erroneous factual assumptions and inferences. All this, too, was set forth in our Original Brief; and, here too, once the reality is admitted, the Court's conclusion that the motion to file the amended and supplemental complaint "was properly denied," must fall. Original brief at pp. 48-53 and nn. 128-142.

(H) It follows from paragraphs (A) through (G), hereof, that this Court is also legally obliged on this record to decide, and cannot lawfully avoid, issues (2), (4), and (5), i.e., the procedural and substantive due process merits, the 42 U.S.C. § 1983 "persons" questions, and the Eleventh Amendment immunity questions. Those were the dispositive questions below; they were properly brought here on appeal and cross-appeal; they were briefed and argued; and Article III compels them to be decided. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.). See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.), See generally Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 6-9 (1959).

(I) This Court's decision respecting "property" and "liberty" and this Court's dicta on the scope of judicial review of arbitrary and capricious tenure denial decisions have the effect of denying the protection of the Fourteenth Amendment to the United States Constitution to every non-tenured professor in the University of Wisconsin system and very likely to every non-tenured public employee in the States of Illinois, Indiana, and Wisconsin.

(J) This Court's choice not to decide the three major substantive questions decided by the trial court leaves the law disturbed and unsettled as to important and basic constitutional and statutory questions, critical to this case, to state governments and those who seek properly to sue them, and to the federal trial courts in this Circuit.

SUMMARY

In sum, this Court's brief *Per Curiam* opinion works a grave abridgement of the individual rights of John L. Stebbins, Jr., while at the same time setting precedent which forecloses the Fourteenth Amendment rights of public employees and failing to set precedent—though obliged to do so—which would resolve important and basic, currently unresolved questions of law as to which citizens, state governments, and the federal trial courts in this Circuit require guidance.

Respectfully submitted,

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APPENDIX C

John L. Stebbins, Jr.,
Plaintiff-Appellant, Cross-Appellee,

v.

John C. Weaver and Board of Regents of the
University of Wisconsin System,
Defendants-Appellees, Cross-Appellants.

Nos. 75-1845, 75-1846.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 27, 1976.

Decided July 7, 1976.

Rehearing and Rehearing En Banc
Denied Aug. 3, 1976

Before CUMMINGS and SPRECHER, Circuit Judges, and STECKLER, District Judge.*

PER CURIAM.

In this civil rights action filed under 42 U.S.C. § 1983, plaintiff, formerly an assistant professor in the Mathematics Department of the University of Wisconsin-Milwaukee, challenges defendants' refusal to grant him tenure. Plaintiff was first employed as an assistant professor in 1965 pursuant to a 3-year contract. Thereafter he received another 3-year contract. At

* The Honorable William E. Steckler, Chief Judge of the Southern District of Indiana, is sitting by designation.

the time of his 1965 appointment plaintiff was informed that with normal development in the areas of teaching, research and community service he could expect to obtain tenure. During his six years' service, he had an extremely successful teaching career and was productive in terms of academic publishing and community service. However, in March 1970, the dean of the College of Letters and Science advised plaintiff that his appointment would terminate in June 1971 upon the expiration of his second contract of employment.

In January 1970, the Executive Committee of the Department of Mathematics voted to deny plaintiff tenure. At its July 1970 meeting, the Executive Committee gave the following reasons for its action:

1. His research was not such as to warrant promotion;
2. His area of complex analysis was adequately covered by tenured faculty in the department.

In late March and early April 1971, the Executive Committee of the Mathematics Department considered whether to reopen its earlier decision regarding plaintiff's tenure. During the four days of hearings, he was given an opportunity to present information concerning his qualifications, but nevertheless the Committee did not change its original decision. Two of the committee members did not attend all the hearings but participated in the final vote. The Committee refused plaintiff's request that the decision be based solely on the evidence adduced at the hearings. It refused to disqualify members who had participated in the earlier decision under review. Plaintiff was not allowed to examine members of the Committee as to the evidence upon which they had made their earlier decisions, and the Committee refused to state in writing the evidence on which it based its determinations. At this session, no information or evidence unfavorable to the plaintiff was presented but information overwhelmingly favorable to him was considered.

Plaintiff's subsequent appeals were respectively denied by the dean of the College of Letters and Science of the University of Wisconsin-Milwaukee, the University Committee there, the president of the University of Wisconsin System and finally by the Board of Regents.

This action against the president and the Board of Regents of the University of Wisconsin System was then instituted. Plaintiff sought a judgment that their decision not to promote and grant him tenure violated his rights under the Fourteenth Amendment. He also sought reinstatement as an assistant professor and an injunction against defendants' filling any tenured positions in the Mathematics Department of the University of Wisconsin-Milwaukee "until a final determination is made in accordance with procedural due process as to whether the Plaintiff should be granted tenure as a professor" in the department.

The district court ultimately granted defendants' motion to dismiss the action on the ground that the complaint failed to state a claim on which relief could be granted. *Stebbins v. Weaver*, 396 F.Supp. 104 (W.D.Wis.1975).

In his comprehensive opinion, the district judge overruled defendants' contentions that they were not persons within the meaning of 42 U.S.C. § 1983 and that the suit was barred by the Eleventh Amendment. He pointed out that plaintiff had alleged "an explicit, though unwritten, contractual agreement under which he was entitled to tenure provided certain conditions on his part were met, and he has alleged that those conditions were met." 396 F.Supp. at 111. Therefore, Judge Doyle concluded that dismissal for lack of a protected property interest in reemployment would be improper in the absence of whatever evidence plaintiff might be able to submit.

Balancing the interests of the State and the plaintiff, the court decided that he was constitutionally entitled to "some

minimal due process." 396 F.Supp. at 112. However, the court found that the procedure followed by the defendants in this case was sufficient to comply with the requirements of due process. We affirm the decision of the district court to dismiss the suit, but we rely on different reasons.

[1] Initially, plaintiff attacks the district court's failure to permit him to file an amended and supplemental complaint. Plaintiff sought to file this pleading after the court had rendered but stayed its original ruling. The new complaint alleged no new facts which would have required the court to reconsider its earlier decision. Consequently, the motion to file the complaint was properly denied. *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972); *O'Bryan v. Chandler*, 352 F.2d 987, 990-991 (10th Cir. 1965), certiorari denied, 384 U.S. 926, 86 S.Ct. 1444, 16 L.Ed.2d 530.

[2] Plaintiff also asserts that the district court should not have decided the merits of this case under Rule 12 of the Federal Rules of Civil Procedure. However, the merits were put in issue by virtue of defendants' motion to dismiss for failure to state a claim upon which relief could be granted and were adequately briefed below. Judge Doyle accepted the truth of the allegations of the complaint, construed liberally to the plaintiff, and considered the entire record before ruling. 396 F. Supp. 106, 117. He even invited further factual information, but none wdas forthcoming. In such a setting, there was no abuse of Rule 12.

[3] Because the case is before us on defendants' motion to dismiss, we also must take as true plaintiff's allegation that he was informed that he could eventually expect tenure if he met certain standards of professional competence. This is of course true of most neophyte members of university faculties, including this very institution. *Board of Regents v. Roth*, 408 U.S. 564, 566-567, 92 S.Ct. 2701, 33 L.Ed.2d 548. As with *Roth*,

it is settled that plaintiff "did not have a *property* interest sufficient to require" the Fourteenth Amendment's procedural protections. 408 U.S. at 578, 92 S.Ct. at 2710.[1] Our decision in *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), certiorari denied, — U.S. —, 96 S.Ct. 1748, 48 L.Ed.2d 208, 44 LW 3624 (*Hostrop II*) is not to the contrary, for there the junior college president was discharged in July 1970 even though he had a valid employment contract at least through June 30, 1971.

As to plaintiff's liberty right, there is no allegation that defendants have injured his good name, reputation, honor or integrity by charging him with dishonesty or immorality. He is free to seek another job. There has been no public disclosure of the reasons for the denial of tenure. Therefore he has not been deprived of liberty. *Board of Regents v. Roth, supra*, 408 U.S. at 573-575, 92 S.Ct. 2701; *Bishop v. Wood, supra*, — U.S. at —, 96 S.Ct. at 2077, 44 LW at 4822.

[4-6] Plaintiff also asserts that the defendants' arbitrary and capricious action in denying him tenure violated his constitutional right to substantive due process. This argument in effect asks us to review the merits of the decision to deny plaintiff tenure.[2] We decline to do so. The right to substantive due

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[1] See also *Bishop v. Wood*, — U.S. —, —, —, 96 S.Ct. 2074, 2077-2080, 48 L.Ed.2d 684, 44 LW 4820, 4821-4822. In *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570, the plaintiff was entitled to show his entitlement to continued employment because of the *de facto* tenure program at Odessa College.

[2] Even if plaintiff were entitled to procedural due process, our scope of review of the tenure decision would be limited to determining whether it was arbitrary or capricious. *Chung v. Park*, 514 F.2d 382, 387 (3d Cir. 1975) certiorari denied, 423 U.S. 948, 96 S.Ct. 364, 46 L.Ed.2d 282, 44 LW 3280; *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973). However, in cases such as this one, where the decision is based on a subjective evaluation, we would decline to review the merits absent some showing of gross abuse. Chung v. Park, supra. . . . .

process, as then Judge Stevens admonished, is no greater than the right to procedural due process in this type of case. As seen, Stebbins had no property or liberty right entitling him to procedural due process, and accordingly there is no basis upon which we can say the denial of tenure was error.[3] *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974); *Miller v. School District Number 167, Cook County, Illinois*, 495 F.2d 658, 660 (7th Cir. 1974); cf. *TA Moynahan Properties, Inc. v. Lancaster Village Corp., Inc.*, 496 F.2d 1114, 1117 (7th Cir. 1974).

Because the due process and other points have been resolved in defendants' favor, it is unnecessary to resolve whether they are "persons" within 42 U.S.C. § 1983 and whether they are immunized by the Eleventh Amendment, as presented by the cross-appeal.

Judgment affirmed.

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[3] Of course, had plaintiff been able to demonstrate that the decision was based on an impermissible discrimination, such as on the basis of race, or made in retaliation for the exercise of a protected right, we would review it. *Hostrop II, supra*, 523 F.2d at 573; *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 568 (7th Cir. 1972), certiorari denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590.

APPENDIX D

John L. STEBBINS, Jr., Plaintiff,
v.
John C. WEAVER and Board of Regents
of the University of Wisconsin
System, Defendant.

No. 72-C-111.

United States District Court,
W. D. Wisconsin.

June 3, 1975.

JAMES E. DOYLE, District Judge.

This is a civil action for declaratory and injunctive relief. Jurisdiction is invoked pursuant to 42 U.S.C. § 1983. The amount in controversy is alleged to exceed ten thousand dollars exclusive of interest and costs.

Plaintiff seeks a declaratory judgment holding that, both as to form and result, the procedures by which he was denied tenure as a member of the faculty of the University of Wisconsin-Milwaukee violated the due process clause of the Fourteenth Amendment of the United States Constitution. He further seeks injunctive relief reinstating him as an assistant professor, and barring the defendants both from denying him tenure without awarding him a hearing procedure comporting with constitutional requirements and from filling any tenured positions in the Mathematics Department of the University of Wisconsin-Milwaukee until such time as a final decision regarding the plaintiff's tenure is reached by means of a constitutionally adequate decision-making process.

Defendants have moved to dismiss this action on the grounds that this court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. It is to this motion that this opinion and order are addressed.

For the purpose of this motion, I take as true the allegations of the complaint, construed liberally to the plaintiff. Those allegations are summarized in the following section of this opinion headed "Facts."

Facts

Plaintiff is a Wisconsin resident. Defendants Weaver, President of the University of Wisconsin System, and the Board of Regents of the University of Wisconsin System are legally empowered to govern and manage public higher education in Wisconsin, and to appoint professors at the University of Wisconsin-Milwaukee. In 1965 plaintiff was retained by the predecessors of the defendants as an assistant professor in the Mathematics Department of the University of Wisconsin-Milwaukee pursuant to a three-year contract. At the time of his appointment, the plaintiff was informed that with normal development in the areas of teaching, research, and community service he could expect to obtain tenure. During the ensuing six years the plaintiff enjoyed an extremely successful teaching career, was productive both in terms of academic publishing and community service, received a second three-year contract at the conclusion of the first three years, was awarded merit salary raises, and was assigned expanded duties.

In January of 1970, however, the Executive Committee of the Department of Mathematics met and voted to terminate plaintiff's faculty appointment. Plaintiff was not notified of the meeting, nor given an opportunity to be heard, nor allowed to confront the witnesses against him, nor permitted to submit to

the Committee copies of his professional works or a record of his accomplishments.

On July 6, 1970 the Executive Committee met again, and took a position on the reasons for which the plaintiff was denied tenure: (a) his research was not such as to warrant promotion; and (b) his area, namely, complex analysis, was adequately covered by tenured faculty in the Department. Again the plaintiff was not given an opportunity to be present at the Committee's meeting. Four months later, the Committee voted to promote and to award tenure to an assistant professor, other than plaintiff, who was also untenured and who had the same research specialty. Because the conduct and decisions of the Executive Committee were repeatedly disapproved by the Dean of the College of Letters and Science, the Executive Committee became hostile toward plaintiff.

In March of 1971, the Executive Committee held hearings on the issue of reopening its earlier decision regarding the plaintiff's tenure status. After four days of hearings, during which the plaintiff was given an opportunity to present information concerning his qualifications the Committee voted to allow their original decision to stand, thus denying the plaintiff tenure status and effectively terminating his employment at the University. Two of the committee members who participated in the vote on whether the plaintiff's case should be reopened did not attend the "substantive portions of the hearings." The Committee refused plaintiff's request that its decision be based solely on the evidence adduced at the hearing. The Committee refused to disqualify from participation in the hearing or subsequent vote members who had participated in the earlier decision then under review. Plaintiff was not allowed to examine Committee members as to the evidence upon which they had made their earlier decisions to deny him promotion. The Committee refused to state in writing the evidence upon which it based its determinations. No information unfavorable to the plaintiff was

presented at the hearing. Information overwhelmingly favorable to the plaintiff was presented at the hearing.

The plaintiff then appealed both alleged procedural errors by, and the substantive decisions of, the Executive Committee to the Dean of the College of Letters and Science of the University of Wisconsin-Milwaukee, then to the University of Wisconsin-Milwaukee University Committee, then to the defendant Weaver, and finally to the defendant Board of Regents. Each reviewing agency or person allowed the decision of the Executive Committee to stand.

Opinion

I. *Jurisdiction*

A. *28 U.S.C. § 1343(3).*

[1] Defendant Weaver argues that this court lacks subject matter jurisdiction over this suit against him, as he is being sued in his "official capacity" and is therefore not a "person" within the meaning of 42 U.S.C. § 1983.[1] I hold that defendant Weaver is a "person" for the purpose of § 1983 regardless of whether he is being sued in an individual or official capacity.

[2, 3] Since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), it has been clear that state officials charged as individuals with unconstitutional activity are amenable to suit under 42 U.S.C. § 1983. Federal jurisdiction may also be exercised through § 1983 to redress constitutional wrongs ". . . through requiring appropriate official acts by officials sued in their representative capacities." *Harkless v. Sweeny Independent School District*, 427 F.2d 319, 323 (5th cir. 1970). The Supreme Court has frequently permitted relief under § 1983

[1] It may be that only a § 1983 cause of action can provide a federal court with subject matter jurisdiction under § 1343(3). See *City of Kenosha v. Bruno*, 412 U.S. 507, 511-513 (1973); The Supreme Court, 1972 Term, 87 Harv.L.Rev. at 254, footnote 15.

against state officials sued in this representative capacity.[2] See, e. g., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). Although the distinction between a suit against a state official individually and one naming that same defendant in an official capacity may be relevant to issues of constitutional or common law immunity (see the following section of this opinion), it is immaterial to the definition of the term "person" in § 1983. Defendant Weaver is a "person" under § 1983, and subject matter jurisdiction over the suit against Weaver is present under 28 U.S.C. § 1343(3).

The defendant Board of Regents also contends that this court lacks subject matter jurisdiction in this suit against it, arguing that state agencies are not "persons" for the purpose of § 1983. It is true that other circuits have held state agencies in general and educational institutions in particular to be outside the scope of § 1983. See, e. g., *Whitner v. Davis*, 410 F.2d 24 (9th cir. 1969); *Blanton v. State University of New York*, 489 F.2d 377 (2nd cir. 1973). The law of the Seventh Circuit, however, is quite clearly to the contrary. In *Lee v. Board of Regents of State Colleges*, 441 F.2d 1257 (7th cir. 1971), a state agency similar to the present Board was held to be a "person" for the

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[2] The exclusion of "municipalities" from the scope of § 1983, see *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed. 2d 596 (1973) and *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), has no bearing on whether state officers are "persons" within the meaning of that statute. And the notion that the term "person" in § 1983 was not intended to refer to individual state officers, whether sued in their representative capacity or not, is so strained and would produce such a substantial reduction in the power of the federal courts to vindicate federal rights, that I would be loathe to accept it without explicit direction from an appellate court.

The contention of the defendant that state officials sued in their official capacity are not "persons" because they are the "state," is an attempt to raise an Eleventh Amendment defense as if it were a statutory claim. It will be discussed in the following section on the Eleventh Amendment.

purpose of 42 U.S.C. § 1983. See also *Roth v. Board of Regents of State Colleges*, 310 F.Supp. 972, 974 (W.D.Wis.1970), *aff'd* 446 F.2d 806 (7th cir. 1971) *rev'd* on other grounds, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The defendant Board argues that these Seventh Circuit decisions were implicitly overruled by the Supreme Court's decisions in *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) and *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). In *Moor*, elaborating on its holding in *Monroe v. Pape*, *supra*, the Court held counties not to be "persons" for the purposes of § 1983. *Bruno* established that municipalities were not "persons" under § 1983 irrespective of the relief requested in any action brought against them. The defendant argues that a state agency is a "political subdivision" of the state, and therefore no more subject to suit under § 1983 than are cities and counties. See *Moor*, 411 U.S. at 693, 93 S.Ct. 1785.

The *Monroe*, *Moor*, and *Bruno* decisions were exercises in statutory interpretation. In each case the Court turned to the legislative history of § 1983 to find an explicit intent to exclude cities and counties from the scope of that statute. The decision to exclude "municipalities" from the reach of § 1983 was prompted by a fear on the part of influential House members that Congress lacked "the constitutional power to impose liability" upon such entities. *Moor*, 411 U.S. at 709, 93 S.Ct. at 1796. In the opinion of these congressmen, the Congress had the power to impose liability on the states on the one hand and individuals on the other, but not "local subdivisions" of government. *Ibid.*, footnote 24. The Conference Committee was told by the delegates from the House that a section of the Senate's proposed bill imposing liability upon towns and counties ". . . must go out or we should fail to agree." 411 U.S. at 709, 93 S.Ct. at 1796. Congress had no doubt that states were subject to the provisions of the Fourteenth Amendment and could

be held responsible for the preservation of a citizen's rights under the Constitution. See *Moor*, 411 U.S. 709, at footnote 24, 93 S.Ct. 1785. The argument that liability could clearly be placed upon the states was advanced against imposing such liability upon cities and counties. If liability could be constitutionally imposed on the states, it could be imposed on their agencies as well. While cities and counties were frequently mentioned in legislative debate as examples of the "subdivisions" not to be included as "persons" under § 1983, state agencies were not. Congress saw no constitutional impediment to imposing liability on state agencies and no need to place them beyond the ambit of § 1983.

[4] I follow the law of this circuit holding such agencies to be "persons" for the purpose of § 1983. Subject matter jurisdiction in this suit against the defendant Board of Regents exists under 28 U.S.C. § 1343(3).

B. *The Eleventh Amendment*

B. The Eleventh Amendment to the Constitution of the United States provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ." The Eleventh Amendment is considered to bar suits in federal court in which an unconsenting state is named as a defendant by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Duhne v. New Jersey*, 251 U.S. 311, 40 S.Ct. 154, 64 L.Ed. 280 (1920); *Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). Defendant Weaver contends that because he is being sued in his official capacity, the plaintiff's suit against him is a suit against the state of Wisconsin for the purpose of the Eleventh Amendment. He considers it irrelevant that the plaintiff has requested only injunctive and declaratory relief, rather than monetary damages.

He states that the law of Wisconsin considers a suit against a state officer in his or her "official" or "representative" capacity to be a suit against the state. I will assume that defendant Weaver is correct in that contention.

[5-7] The proper interpretation of the Eleventh Amendment is a question of federal law. State law is relevant only to the extent that federal law makes it so. The history of the Eleventh Amendment reveals its purpose to be protection from suits brought in the federal courts seeking to impose a liability which must be paid from state governmental funds. *Cohens v. Virginia*, 19 U.S. 264, 405, 5 L.Ed. 257 (1821); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). It bars actions which are "in essence one(s) for the recovery of money from the state . . . even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945); *accord*, *Edelman v. Jordan, supra*.

[8] In situations where a state official is sued for damages or a retroactive injunction compelling payments of some kind, a federal court may be required to consider the relationship under state law between the defendant official and the state. If that relationship is such that any monetary judgment rendered against the defendant official would necessarily be paid out of a state treasury rather than out of the official's personal resources, then a suit for monetary relief against that official will be considered, for the purpose of the Eleventh Amendment, a suit against the state. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66 S.Ct. 745, 90 L. Ed. 862 (1946).

[9] Under constitutional principles long established and recently reaffirmed, however, the Eleventh Amendment does not bar a suit by a citizen against a state officer where the relief re-

quested is a prospective injunction against allegedly unconstitutional behavior on that officer's part. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Scheur v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

The *Young* principle—that a state official can be acting "under color of state law" for the purpose of the Fourteenth Amendment, though not qualifying as the "state" for the purpose of the Eleventh—has been called a "fiction." 3 Davis, *Administraitve Law* § 27.03 (1958). If so, it is a durable fiction, critical to the network of protections afforded constitutional liberties. Long after the passage of the Eleventh Amendment, the Fourteenth Amendment created for the first time constitutional guarantees against the unwarranted exercise of state, as opposed to federal, power. Congress radically expanded the jurisdiction of the federal courts, demonstrating its intention to establish the federal judiciary as the primary "guarantor of basic federal rights against state power." *Mitchum v. Foster*, 407 U.S. 225, 238-239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972); see also Frankfurter and Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System*, 64 (1928). This guardianship could not be maintained by the federal courts if they lacked the power, claimed in *Young* and reaffirmed consistently since then,[3] to enjoin unconstitutional actions by state officials.

Defendant Weaver maintains that if defendants are enjoined to rehire plaintiff, his future wages will be paid out of state funds. It is a rare prospective injunction against a state official that will not affect a state treasury in the same way.[4] Acceptance of defendant's position would severely limit *Young*. Defendant urges that *Edelman v. Jordan* and *Scheur v. Rhodes, supra*, lend support to his contention. Examination of *Edelman* or *Scheur* reveals that they explicitly rejected any narrowing of the *Young* principle. In *Edelman*, the court held the Eleventh Amendment a bar to a suit in federal court seeking the payment of back welfare benefits illegally withheld by a state agency from eligible recipients. The Court stated clearly that the Eleventh Amendment posed no bar to that part of the suit seeking an injunction to compel the payment of such benefits prospectively. The Court found that "such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young, supra*." 415 U.S. at 669, 94 S.Ct. at 1358. The Court is equally clear in *Scheur* that the rule of *Young* "that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law" remains "well settled" in cases involving "a question of the federal courts' injunctive power, [as opposed to claims] for monetary damages." 416 U.S. at 238-239, 94 S.Ct. at 1687.

[3] See, e. g., *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304, 72 S.Ct. 321, 96 L.Ed. 335 (1952).

[4] See Justice Rehnquist's discussion of this point in *Edelman*, 415 U.S. at 651, 94 S.Ct. 1347.

[10] Suits against state educational officers have been upheld against an Eleventh Amendment defense on previous occasions in this court. See, e. g., *Roth v. Board of Regents of State Colleges*, 310 F.Supp. 972 (W.D.Wis.1970), *aff'd* 446 F.2d 806 (7th Cir. 1971), *rev'd* on other grounds, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Lee v. Board of Regents of State Colleges*, 306 F.Supp. 1097 (1971) *aff'd* 441 F.2d 1257 (1971). Plaintiff's claim for prospective injunctive relief against defendant Weaver is not barred by the Eleventh Amendment.

[11] Defendant Board of Regents also claims that the plaintiff's suit against it is a suit against the state barred from federal court by the Eleventh Amendment. If this were a suit for damages I would be required to examine carefully whether any monetary judgment against the Board would be satisfied out of the state funds. See, e. g., *Hopkins v. Clemson College*, 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911). However, the

relief requested is solely a prospective injunction. The principle of *Young* is as applicable to a suit against a state agency for prospective injunctive or declaratory relief as it is to a suit against an individual state officer. *Lee v. Board of Regents, supra* at 441 F.2d 1260. Plaintiff's suit against the Board is not barred by the Eleventh Amendment.

II. *Motion to Dismiss for Failure to State a Claim*

A. *Presence of "property" interest.*

Defendants contend that *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) conclusively hold that a nontenured faculty member whose contract has expired has no remaining interest in employment protected by the due process clause, and therefore can be severed from state employment without being afforded the procedural and substantive protections available when one's liberty or property is at stake. In *Roth*, the court noted that the record disclosed simply that a person hired by the state for one year had not been rehired for a second. It found in these circumstances alone no legally cognizable interest in continued employment requiring protection under the Fourteenth Amendment. But in *Perry* the Court stated that the absence of an explicit tenure provision in one's contract ". . . may not always foreclose the possibility that a teacher has a 'property' interest in re-employment." 408 U.S. at 601, 92 S.Ct. at 2769. It held that a plaintiff could well possess an interest in continued employment created by some other sort of contractual provision, expressed or implied, of which he or she could not be deprived constitutionally without being afforded due process. "Subjective expectancy" of future employment by a plaintiff is not sufficient to invoke constitutional protections, but a plaintiff claiming a protected property interest ". . . must be given an opportunity to

prove the legitimacy of his claim of such entitlement in light of "'the policies and practices of the institution.'" 408 U.S. 603, 92 S.Ct. at 2700.

[12] In the present case the plaintiff has alleged an explicit, though unwritten, contractual agreement under which he was entitled to tenure provided certain conditions on his part were met, and he has alleged that those conditions were met. Dismissal for lack of such a protected interest would be proper only after consideration of whatever evidence the plaintiff may be able to submit.

B. *Nature of appropriate due process protection.*

The Supreme Court has made clear that due process guarantees vary with factual and institutional contexts. See, for example, *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In determining the nature of the due process protections to which the plaintiff in this case is entitled, I must ". . . begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961).

[13] The basic governmental and private interests at stake in tenure decisions are readily identifiable. Wisconsin has a valid and substantial interest in maintaining the highest possible standards of quality in the educational opportunities offered in its institutions of higher learning. Because the grant of tenure is virtually a lifetime guarantee of the opportunity to teach and to engage in research within the University of Wisconsin system, the state has an interest in ensuring that those who are offered tenure are highly qualified to meet those responsibilities. The state is entitled to investigate the academic qualifications of faculty candidates, to assess those qualifications, and to grant or

deny tenure to a given candidate on the basis of that assessment. The interest of the plaintiff in the tenure decision is also substantial. To be denied this virtual lifetime guarantee is a significant loss.[5]

Balancing these interests of the state and the plaintiff, I conclude that plaintiff was constitutionally entitled to some minimal due process.

It is plain from the complaint that during the period of more than two years while the initial decision of the Executive Committee was under review, plaintiff was afforded: a statement of the reasons why the university intended not to promote him; notice of a hearing at which he could respond to the stated reasons; and a hearing. But plaintiff contends that he was constitutionally entitled to further specific protections, which were denied him. Before considering separately his claims to each such protection, I offer an observation about the institutional context of this case which bears upon all of his claims.

[14] Because the quality of the faculty of the university is importantly affected by the exercise of the tenure decision, the state has a valid and substantial interest in placing the power of operative decision in appropriate hands. Initially, the question is whether to place this power within or without the university community; it is reasonable to place it within the university. The question then becomes where to place it within the university; it is reasonable to place the power with the members of the departmental faculty concerned.

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[5] Whether I may consider, without specific evidence of record, that negative consequences flow from the denial is unclear. In *Roth v. Board of Regents of State Colleges*, 310 F.Supp. 971, 979 (W.D. Wis.1970), I stated: ". . . . [I]t is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." The Court of Appeals noted "the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor." 446 F.2d 806, 809. The Supreme Court emphasized (408 U.S. at 574, 92 S.Ct. 2701, N. 13) that this was no more than an "assumption," so far as the case record in *Roth* was concerned, but said that even if the assumption were made, "liberty," within the meaning of the due process clause, is not at stake when a decision against tenure by one employer renders a teacher less attractive to some other employees.

If this allocation of power within the institution comports with the due process clause of the Fourteenth Amendment, and I believe it does, many consequences flow. Perhaps the most consequential is that the operative decision will be formed by the departmental faculty over a period of years, based upon observation of the candidate, based upon intuitive responses to the candidate, based upon the particular member's developing opinion, and based upon the developing opinions entertained by other members to the extent that these opinions are shared from time to time, whether expressly or subtly. Although it is to be hoped that the members of the departmental faculty will develop their opinions of the candidate with all the objectivity and care they can muster, it is quite apparent that inevitably the subjectivity quotient will be high.

When the time for decision comes, it will not be entered upon a blank page—as it might be by a judge or a jury carefully chosen so as to exclude from the process any earlier acquaintance with the candidate and any earlier knowledge of his professional capacity and personal characteristics. To demand of the members of the departmental faculty that they consciously shed all earlier impressions of the candidate would be sharply to diminish the very justification for lodging with them the power of decision.

As against all this is the candidate's interest in a favorable decision on tenure. It does not follow inexorably that a favorable decision is less likely to flow from the extended, complex, and somewhat obscure process I have described than from a formal procedure in which the decision is reached in a neutral and detached forum strictly upon the evidence presented to it.

But when the time for decision comes, and the initial decision is unfavorable, the candidate's immediate interest lies in getting it changed. It is at this stage that there arises an intense desire on the part of the candidate for a wholly new forum; and, if not for a wholly new forum, then for procedural arrangements which lend maximum difficulty to adherence by the present forum to its initial decision. This represents the more precise setting within which the interests of the government and those of the candidate are to be balanced, and I am persuaded that the balance must be struck generally favorably to the interests of the government.

1. *Participation in initial decision making.*

[15] Plaintiff contends that the failure of the defendants to allow him to participate in the deliberations of the Executive Committee between January and July of 1970, during which the Committee initially determined that he was not qualified for tenure, constituted a violation of procedural due process. One might well benefit from being present at every stage of a decision-making process which may adversely affect one's interest in liberty or property. The state can fairly claim, however, that informed and intelligent decision making is served by allowing certain stages of that same process to unfold free of the limits on candor and informality imposed by adversarial circumstances. In the particular institutional context of this case the exclusion of a tenure candidate from participation in the initial discussion by a faculty committee on whether to deny tenure is not a denial of due process. The state's constitutional ability to exclude an affected party from this initial stage of decision making is, however, contingent on the adequacy of the opportunity to respond to that decision later.

2. *Impartiality.*

Plaintiff alleges that the later hearing afforded him before the Executive Committee was constitutionaly inadequate because

(a) the same committee had earlier voted to deny him tenure; and (b) the committee had become hostile toward him because its conduct and decisions had been repeatedly disapproved by the dean.

Contention (a) must fail, particularly in light of *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). At stake in *Larkin* was a physician's license to practice medicine in Wisconsin, surely an economic stake at least comparable to plaintiff's economic stake in his teaching position. The members of the state medical examining board conducted an "investigative hearing" at which numerous witnesses testified and at which the physician's counsel was present. The board entered findings, conclusions, and a decision in which it found that the physician had engaged in specified conduct proscribed by statute. Its "decision" stated that there was probable cause to believe that the physician had violated criminal provisions of the statutes, and probable cause for a court action to revoke his license. Meantime, the board proposed to hold a "contested hearing" to determine whether the physician's license should be suspended temporarily. A three-judge district court had preliminarily enjoined the board from proceeding with the said contested hearing. The Supreme Court reversed, holding that it was quite unlikely that the physician would ultimately prevail in his contention that it would be a denial of due process for the same board to hold a contested hearing on the issue of temporary suspension of the license after having conducted the investigative hearing and after having entered its findings, conclusions, and "decision." The Court emphasized (421 U.S. 55, 95 S.Ct. 1468):

> No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary

investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing. Without a showing to the contrary, state administrators, "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 [61 S.Ct. 999, 85 L.Ed. 1429] (1941).

[16] I appreciate that there are many distinctions to be drawn between the facts in *Larkin* and the facts as alleged in the complaint in this case. During the "investigative" stage in *Larkin*, the members of the board presumably were not drawing upon their personal experiences with the particular physician over a period of time and were not engaging in subjective judgments about his qualifications; also, counsel for the physician was permitted to be present. Nevertheless, *Larkin* appears to be strong and fresh authority for the proposition that, in the absence of a showing of actual bias, an administrative board is not foreclosed from conducting a hearing on the merits of an issue simply because it has earlier examined into the facts and formed conclusions about them. For reasons I have stated above, this should be particularly so with respect to departmental faculty members and the question of tenure.

I appreciate that despite what I have said, fundamental fairness might require that when the ground for initial decision is narrowly factual—for example, alleged improper conduct on a specific occasion—, the conduct of the subsequent hearing and the review of the initial decision be consigned to another forum. But this complaint alleges that the Executive Committee's two stated reasons were that plaintiff's research was not such as to warrant promotion and that his area of complex analysis was adequately covered by tenured faculty. Plaintiff does not allege that the true reason was neither of these. He alleges only, as we shall see later, that neither of the stated reasons was supported by evidence presented at the hearing.

[17] With respect to the matter of actual bias, I must accept presently as true plaintiff's allegation that prior to his hearing the Executive Committee had become hostile to him because its earlier actions had been criticized by the dean. A decision-making process which left final control over a determination in the hands of a board hostile to the party might well be constitutionally defective regardless of the substantiality of the state's interest in a given allocation of decision-making power. In this case, however, the state made available to the plaintiff some four levels of review through which the final decision of the Executive Committee could be, and was in fact, appealed. At none of these levels is it alleged that the reviewing parties were persons involved in any of the deliberations of the Executive Committee. The state thus took steps to insure that its interest in having the plaintiff's hearing held before the Executive Committee was not furthered at the cost of the plaintiff's interest in a fair and unbiased review of his initial tenure decision. I consider these stages of review constitutionally sufficient with respect to the allegations of actual bias. Also, they served as a corrective measure for whatever residual difficulties may have persisted from the fact that the Executive Committee engaged in a hearing to consider the merits of its own initial decision.

3. *Confrontation with board members.*

Plaintiff argues that the failure of the Executive Committee to allow him to examine its members at his hearing was a violation of due process. As I have noted, there is nothing in the plaintiff's complaint, however, to suggest that the initial action of the Executive Committee depended on findings of primary fact. That action was ostensibly based on a subjective evaluation of the nature and quality of the plaintiff's research. In such a situation, the opportunity to question the members of the Executive Committee might be constitutionally required if needed to provide the plaintiff with an adequate description of the grounds on which the Committee initially denied him tenure.

But according to the allegations of the complaint, the statement given the plaintiff permitted him to marshall and present at his hearing evidence overwhelmingly favorable to him and so extensive that the hearing lasted some four days.

4. *Grounds not adduced at hearing.*

[18] Plaintiff contends that the failure of the Executive Committee to base its final decision solely on evidence adduced at this hearing violated his right to procedural due process. Had the initial decision been based ostensibly on narrow factual grounds, fundamental fairness might require that all the evidence purporting to support those grounds be revealed and that the board consider only that evidence in making its determinations. But the original decision of the Executive Committee purported to evaluate the performance of the plaintiff in fulfilling his teaching and research responsibilities over some five years. Fairness required that before its decision became final, the Committee consider all evidence as to the quality of that performance that the plaintiff could marshall. But as I have said more fully earlier, it was not fundamentally unfair for the members of the Committee to give weight to their own subjective opinions of the plaintiff's work, formed over years of knowing and observing him. Such opinions are a rational and necessary ingredient of the qualitative evaluation at the heart of the tenure process.

5. *Incomplete participation by members.*

[19] Plaintiff argues that his hearing was constitutionally defective in that two members of the Executive Committee did not attend some part of the proceedings, though they later participated in the vote to reaffirm the original decision of the Committee denying the plaintiff tenure. No doubt the shoddy manner in which a hearing is conducted can sometimes support a finding that the aggrieved party has not received a hearing

"at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). From the allegations of the complaint it appears that though the plaintiff's hearing stretched over some four days, ten members were present at all times. The absence of two members from part of the hearing did not render the hearing constitutionally inadequate.

6. *Substantive arbitrariness.*

Plaintiff alleges that the decision of the Executive Committee, following the hearing, "was arbitrary and capricious in that it ignores the overwhelmingly favorable information placed before the Executive Committee." Plaintiff alleges that no adverse information whatever was presented to or by the committee at the hearings. He alleges that the arbitrariness of the decision is demonstrated by the committee's award of tenure to another assistant professor with the same research specialty, four months after the committee had asserted that plaintiff's area of complex analysis was already covered by tenured faculty.

It is not altogether clear in this circuit whether the "substantive" arbitrariness of an administrative decision raises a federal constitutional question under the due process clause. In *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1 (7th cir. 1974), a public school teacher contended that the school board's decision not to renew her contract was completely without basis in fact or logic, and that such an arbitrary and capricious action violated her federal constitutional right to substantive due process. The Court affirmed a dismissal of the complaint on the ground that plaintiff had alleged no stake in "property" or "liberty" entitled to either "substantive" or "procedural" protection by the due process clause of the Fourteenth Amendment. In a rather strong dictum, the Court severely questioned whether federal judges should impose their own view as to what may be related or unrelated to the educational process or as to working relationships within schools. 492 F.2d, at 4. In *Miller*

v. School District Number 167, Cook County, Ill., 495 F.2d 658, 660 (7th cir. 1974), one of the claims of a non-renewed public school teacher was that the reasons for non-renewal as stated by the board were untrue "and that the board's action was arbitrary in the sense that it was completely unsupported by any acceptable reason . . .." The court described this claim as "comparable to the 'substantive due process' argument which we recently rejected in *Jeffries* [citation omitted], and is therefore foreclosed by that decision." Thus, the dictum of *Jeffries* became a holding in *Miller*, binding on me. However, in *T. A. Moynahan Prop., Inc. v. Lancaster Village Coop., Inc.*, 496 F.2d 1114, 1117 (7th cir. 1974), the court declared that the cancellation of an agreement by a federal agency "could be challenged by demonstrating that there was no rational basis for the decision. . . . Cf. *Jeffries v. Turkey Run Consolidated District*, 492 F.2d 1, 3 (7th cir. 1974)." The court proceeded to decide that there was a rational basis for the agency's decision in *Moynahan*.

It appears that any difficulty arising from this uncertainty as to the law of the circuit can be avoided here, however. The complaint does not allege that the stated reasons for the decision were arbitrarily or irrationally inappropriate. It alleges, rather, that no evidence to support the stated reasons was presented at the hearing. Perhaps if there was available to the Executive Committee no factual basis whatever for its stated grounds of decision, the due process clause would be violated. *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). See *Jeffries, supra*, at 5, n. 14. But both of the stated grounds for the decision here involved qualitative judgments of some sort, either of the plaintiff's abilities or of those of the tenured members of the Mathematics Department. Perhaps such decisions can never be found to be without basis in fact, for they are not wholly factual decisions. When a decision purports not to resolve questions of primary facts but to evaluate facts, the decision will often be based on the opinions of persons considered qualified to make qualitative judgments in a particular area of

expertise. Such opinions may be considered an "evidentiary" basis.

[20] There is a narrower basis on which the plaintiff's claim must be rejected. He does not claim that the Executive Committee lacked any evidence on which to base its decision, but only that no such evidence was presented at his hearing. Thus his claim that the Executive Committee's decision was arbitrary is dependent on the validity of his claim that only evidence presented at his hearing could be considered when the Committee voted to affirm or reverse its original decision to deny the plaintiff tenure. Because I believe that the Committee was not bound to consider only evidence laid before it at the hearing, an allegation that the hearing evidence was exclusively favorable to the plaintiff is not sufficient to support a claim that the action of the Committee subsequent to the hearing was arbitrary and capricious.

Order

Upon the basis of the entire record herein, defendants' motion to dismiss is hereby granted and this action is dismissed on its merits, together with costs.

APPENDIX E

John L. Stebbins, Jr.,
Plaintiff,

v.

John C. Weaver and Board of Regents of the University of Wisconsin System,
Defendants.

Opinion and Order
72-C-111

Defendants moved to dismiss this action on the ground that subject matter jurisdiction is lacking because of the Eleventh Amendment and because neither defendant is a "person" within the meaning of § 1983; and on the ground that the complaint fails to state a claim upon which relief can be granted because it fails to show possession of a job interest entitled to protection under the Fourteenth Amendment. The brief accompanying the motion included argument to the effect that, assuming that plaintiff enjoyed a job interest entitling him to protection under the Fourteenth Amendment, the complaint shows that he received such protection. Plaintiff served and filed a memorandum in opposition to the motion to dismiss. Defendants served and filed a reply memorandum repeating their contention that, assuming plaintiff possessed a protected job interest, due process requirements had been met in his case, as the case is alleged in the complaint.

The briefing schedule issued by the clerk following the filing of defendants' motion and supporting brief provided that plaintiff might have a certain time within which to serve and file "an answering brief, together with such documents as are permitted by Rule 56(e), Federal Rules of Civil Procedure, to be filed in opposition to a motion for summary judgment." Provision was made in the notice for a time within which defendants might serve and file "a rebuttal brief, together with such

rebuttal documents as are permitted by Rule 56(e) to be filed in support of a motion for summary judgment."

On June 3, 1975, I entered an opinion and order on defendants' motion to dismiss. I accepted as true the allegations of the complaint, construed liberally to plaintiff. I decided that the complaint supported subject matter jurisdiction, as against defendants' contentions. I decided that the dismissal for lack of allegation of a sufficient interest in the job was unwarranted. But I decided that the complaint did not state a claim that plaintiff had been denied the protections afforded him by the due process clause of the Fourteenth Amendment. Judgment was entered dismissing the action.

Thereafter, on plaintiff's motion, I ordered that said judgment be stayed to permit plaintiff to serve and file a motion for leave to amend and supplement the complaint. A motion for leave to amend and supplement the complaint, together with a proposed amended and supplemental complaint, has now been filed, and it is to this motion that the present opinion and order are directed.

Plaintiff contends that he was surprised that in its June 3, 1975, opinion and order the court went to the merits of whether the complaint stated a claim that the due process clause had been violated. I believe that plaintiff was fairly warned by defendants' brief in support of their motion and by their reply brief that this was one of their contentions.

The language of the scheduling letter then in use by the clerk of this court, but since modified, was somewhat awkward. It was not intended as an evaluation of defendants' motion by the clerk, characterizing the motion as either a Rule 12(b)(6) motion or as a Rule 56 motion or as some other kind of motion. It was intended to convey the meaning, that if a party considered it permissible and appropriate to submit factual information beyond the allegations of the complaint, such submission

must conform to the requirements imposed by Rule 56 with respect to motions for summary judgment (affidavits on personal knowledge, such facts as would be admissible in evidence, and so on). Assuming that plaintiff's counsel found the clerk's language confusing, I believe that no unfairness could reasonably have resulted. In their reply brief, defendants emphatically asserted that their motion was not a motion for summary judgment. If plaintiff remained in doubt, the doubt could have been expressed to the court at the time and the matter could have been resolved. However, there is a more basic reason for my belief that no unfairness could reasonably have resulted. The adequacy of the complaint to state a claim was clearly put in issue by defendants' motion, however the motion might be classified, and also by both the original brief and the reply brief of the defendants.

The remaining grounds for plaintiff's motion for leave to amend and supplement the complaint relate to the "highly fluid state of the law respecting the constitutional obligations of a university public employer to its professional employees," and to plaintiff's desire to add numerous parties defendant to cope with defenses relating to "persons" under § 1983 and to "common law immunity." The latter consideration is surely untimely. As to the former, I agree that the state of the law on the subject is uncertain. However, the complaint herein was filed in April, 1972, and plaintiff has had abundant opportunity long since to amend his complaint, more than once if reason for it had been shown.

There comes a time to allow a matter to rest. The time has come in this case.

Order

Upon the basis of the entire record, it is ordered that:

1. Plaintiff's motion for leave to file an amended and supplemental complaint is denied.

2. The order entered herein June 13, 1975, staying the judgment entered herein June 3, 1975, is vacated.

Entered this 3rd day of July, 1975.

By the Court:

/s/ James E. Doyle
District Judge

APPENDIX F

Constitutional and Statutory Provisions Involved

Amendment 14, Section 1, United States Constitution

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Wisconsin Statutes

37.11(3), Wis. Stats. (1966)

"To remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such college, but discharges of teachers shall be governed by § 37.31."

37.31(1) (lm), Wis. Stats. (1966)

All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher. An official leave of absence shall not constitute a break in continuous service, nor shall it count toward the 4 years required to attain tenure. No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision. The action and decision of the board in the matter shall be final. The term "teachers" as used in this section includes all persons engaged in teaching as their principal occupation but shall not include any university president or acting president in his capacity as president of any of the state universities.

A teacher shall lose tenure upon discharge or resignation from the state university system. A resignation withdrawn and the withdrawal accepted by the board before the beginning of the next school semester, not including the summer session, shall not be considered as voiding tenure. A teacher losing tenure must upon re-employment serve another probation period.

36.06(1) (2), Wis. Stats. (1966)

The board of regents shall enact laws for the government of the university in all its branches; elect a president and the requisite number of professors, instructors, officers and employes, and fix the salaries and the term of office of each, and determine the moral and educational qualifications of applicants for admission to the various courses of instruction; but no instruction, either sectarian in religion or partisan in politics, shall ever be allowed in any department of the university; and no sectarian or partisan tests shall ever be allowed or exercised in the appointment of regents or in the election of professors, teachers or other officers of the university, or in the admission of students thereto or for any purpose whatever.

The board shall have power to remove the president or any professor, instructor or officer of the university when, in the judgment of the board, the interests of the university require it.

Laws and Regulations of the University of Wisconsin System (1966)

Section 10A.05.

Probationary Appointment Defined. A probationary appointment is an appointment held by a full-time member of the academic staff during the probationary period which precedes determination of tenure status. The conditions of appointment in the case of either a new appointment or a reappointment to a probationary position shall be stated in writing in a letter to the appointee at the time the appointment or reappointment is made.

UW System Merger and Consolidation (1971)

L.1973 c. 335, §§ 5 and 6 repealed former chapters 36 and 37, titled respectively: University of Wisconsin and State Universities, and consisting of sections 36.01 to 336.96 and 37.01 to 37.36 as affected by L.1973, c. 90, 96, 243 and 284. L.1971, c. 100 initially consolidated the University of Wisconsin and the state universities. The following quoted excerpts L.1971, c. 100 indicate the areas affected by the UW system consolidation and set forth uncoded transitional and temporary provisions: § 20(4):

> Faculty tenure retained. Faculty of the former university of Wisconsin employed prior to the effective date of merger shall continue to hold or earn tenure under the tenure rules in effect on the date of merger. Faculty of the former Wisconsin state universities employed prior to the effective date of merger shall continue to hold or earn tenure under section 37.31 of the statutes and any rules established thereunder. For factulty employed after the date of merger, existing tenure rules and statutes shall remain in effect until new rules or statutes become effective. If new tenure rules or statutes become effective any faculty member mentioned in this section may elect to hold or earn tenure under the new rules or statutes.

36.13, Wis. Stats. (1973), Faculty tenure and probationary appointments

(1) *Definitions.* In this section:

(a) "Tenure appointment" means an appointment for an unlimited period granted to a ranked faculty member by the board upon the affirmative recommendation of the appropriate chancellor and academic department or its functional equivalent within an institution.

(b) "Probationary appointment" means an appointment by the board held by a faculty member during the period which may precede a decision on a tenure appointment.

(2) *Appointments.* (a) A tenure appointment may be granted to any ranked faculty member who holds or will hold a half-time appointment or more. The proportion of time provided for in the appointment may not be diminished nor increased without the mutual consent of the faculty member and the institution subject only to sub. (5) and s. 36.21.

(b) A probationary appointment shall not exceed 7 consecutive academic years in a full-time position in an institution. A leave of absence, subbatical or a teacher improvement assignment shall not constitute a break in continuous service nor shall it be included in the 7-year period.

(3) *Rules.* The board and its faculties after consultation with appropriate students shall adopt rules for tenure and probationary appointments, for the review of faculty performance and for the nonretention and dismissal of faculty members. Such rules shall be adopted under ch. 227.

(4) *Continuation of appointment.* (a) Any person who holds a tenure appointment under chs. 36 and 37, 1971 stats., and related rules on the effective date of this act (1973) shall continue to hold tenure as defined under those chapters and related rules.

(b) Any person who holds the equivalent of a probationary appointment under chs. 36 and 37, 1971 stats., and related rules on the effective date of this act (1973) shall continue to enjoy the contractual rights and guarantees as defined under those chapters and related rules, and may elect to be considered for tenure according to the procedures existing under that appointment or under sub. (2).

(5) *Procedural guarantees.* Any person having tenure may be dismissed only for just cause and only after due notice and hearing. Any person having a probationary appointment may

be dismissed prior to the end of the person's contract term only for just cause and only after due notice and hearing. The action and decision of the board in such matters shall be final, subject to judicial review under ch. 227. The board and its several faculties shall develop procedures for the notice and hearing which shall be adopted by rule under ch. 227.

(6) *Limitation.* Tenure and probationary appointments are in a particular institution. A tenure appointment is limited to the institution in which the appointment is held.